Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT of the UNITED STATES

JONATHAN T. GARAAS,

Petitioner,

v.

Disciplinary Board of the Supreme Court
of the State of North Dakota and
Paul W. Jacobson, Disciplinary Counsel,

Respondents.

On Petition For Writ of Certiorari
To The Supreme Court of North Dakota

PETITION FOR WRIT OF CERTIORARI

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156 pp

QUESTIONS PRESENTED

Jonathan T. Garaas, a member of the Bar of the North Dakota as maintained by the Supreme Court of North Dakota, has been "publically reprimanded for violating N.D.R. Prof. Conduct 3.5(a), 3.5(b), and 8.4(e)."

Attorney Garaas, while acting as an advocate on behalf of his clients, spoke only the truth, gave opinions when requested, and asked questions of the lower court as to its jurisdiction. Garaas's conduct was not in issue, but only the *content of his speech* addressed to the lower court on behalf of his client.

The questions presented here are:

1. Have the First Amendment rights of Jonathan T. Garaas, made applicable to the States by the Fourteenth Amendment, been violated by punishing attorney Garaas for the *content* of his speech addressed to a court?

2. Are the North Dakota statutes, and Rules of Professional Conduct enacted by the North Dakota Supreme Court, too broad and too vague to punish core speech?

3. Have the First Amendment rights of Jonathan T. Garaas, made applicable to the States by the Fourteenth Amendment, been violated because his speech has been punished without regard to the truth of his statements, without regard to whether his speech was opinion for which factual and legal basis existed without controversy, or without regard to whether the speech was rhetorical hyperbole?

4. Have the Due Process of Law rights of Jonathan T. Garaas, guaranteed by the Fourteenth Amendment, been denied because the North Dakota Supreme Court did not require Disciplinary Counsel to plead, and prove, by competent evidence, (a) the falsity of attorney Garaas's speech, (b) that the content of the speech caused a disruption of a tribunal in administrating justice, or (c) that the content of the speech brought reproach upon the judiciary?

5. Can any court, consistent with the First Amendment and the Fourteenth Amendment, punish a lawyer for speaking the truth, truthfully responding to questions posed by the court, and asking questions on behalf of his clients?

LIST OF ALL PARTIES TO THE PROCEEDINGS

A. List of Petitioner(s).

Jonathan T. Garaas, attorney admitted to the Bar of North Dakota as maintained by the Supreme Court of North Dakota, a member of the Garaas Law Firm, 1314 23rd Street South, Fargo, North Dakota 58103.

B. List of Respondents.

Disciplinary Board of the Supreme Court of the State of North Dakota, c/o Penny Miller, Secretary, Judicial Wing, 1st Fl., 600 E. Boulevard Avenue, Department 180, Bism arck, North Dakota 58505-0530; and

Paul Jacobson, Disciplinar y Counsel, 515½ East Broadway, Ste. 102, P.O. Box 2297, Bismarck, North Dakota 58502-2297.

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PETITION FOR WRIT OF CERTIORARI

Jonathan T. Garaas respectfully prays that Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of North Dakota that denies Petitioner his right to free speech guaranteed by the First Amendment of the Constitution of the United States of America and his right to due process of law and equal protection of law guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

OPINIONS BELOW

The opinion that gives rise to this petition is In Re Garaas, 2002 ND 181, 652 NW2d 918. The case is reprinted on Appendix pages 1 through 20.

The Report of the Hearing Panel and Order of Reprimand issued by the Hearing Panel of the Disciplinary Board of the Supreme Court of North Dakota is unpublished. The report is reprinted on Appendix pages 21 through 31.

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The Supreme Court of North Dakota issued its judgment on November 15, 2002. Pursuant to Supreme Court Rule 13.1, this petition is filed within 90 days of the Supreme Court of North Dakota's judgment.

The constitutional right to free speech denied the Petitioner was raised in Petitioner's Response to Petition for Discipline. Appendix, pages 34 through 36.

Petitioner Garaas raised his right to free speech in pre-hearing and post-hearing briefs to the Hearing Panel. Appendix, pages 37 through 39, pages 40 through 44.

After adverse findings by the Hearing Panel, Petitioner filed with the Supreme Court of North Dakota a Petition for Review of Hearing Panel's Order and Objection to Hearing Panel's Report. In this document, Petitioner informed the Supreme Court of North Dakota that the Hearing Panel's decision infringes upon Petitioner's constitutional rights of free speech and due process of law. Appendix, pages 49 through 61.

The issues concerning Petitioner's First Amendment right to free speech was addressed in his main brief to the Supreme Court of North Dakota, and in his reply brief. Appendix, pages 64 through 86, pages 89 through 100.

CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES INVOLVED IN THIS PETITION

Article 1 of the Articles of Amendment to the Constitution of the United States of America states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Article 14, § 1, of the Articles of Amendment to

the Constitution of the United States of America states:

> § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

North Dakota Century Code § 27-13-01 provides:

> Duties of attorneys. Every attorney and counselor at law shall:
>
> 1. Maintain respect for courts of justice and judicial officers;
>
> 2. Counsel or maintain no claim that appears to the attorney to be unjust, nor any defense except one the attorney believes to be honestly debatable under the law;
>
> 3. Perform faithfully the attorney's responsibilities as an officer of the court and protector of individual rights;

4. Support the provision of legal services for indigent persons, public service, and public education about the law;

5. Work to make the legal system more accessible, responsive, and just;

6. Employ for purposes of maintaining the causes confided to the attorney, those means only as are consistent with truth and honor, and never seek to mislead the judge or jury by any artifice or false statement of fact or law; and

7. Never reject, from any consideration personal to the attorney, the cause of the defenseless or oppressed, or delay anyone's cause for profit or malice.

North Dakota Century Code § 27-14-02 provides:

Causes for suspension or revocation of certificate of admission to bar. The certificate of admission to the bar of this state of an attorney and counselor at law may be revoked or suspended by the supreme court if he has:

1. Committed an offense determined by the supreme court to have a direct bearing upon a person's ability to serve the public as an attorney and counselor

at law, or the supreme court determines, following conviction of an offense, that the person is not sufficiently rehabilitated under section 12.1-33-02.1;

2. Willfully disobeyed or violated an order of the court requiring him to do or to refrain from doing an act connected with or in the course of his professional practice;

3. Willfully violated any of the duties of an attorney or counselor at law;

4. Engaged, while attorney general or assistant attorney general of this state, or while employed in the office of the attorney general, in the private practice of the law, or rendered to any person, for pay, profit, and remuneration, any legal services other than those required in performing the duties imposed upon him by virtue of the duties of his office, but an assistant attorney general may finish any case, proceeding, or legal business in which he was engaged at the time of his appointment, and an attorney general or assistant attorney general with the permission of the attorney general may voluntarily represent indigent clients referred by an organized pro bono program in addition to the regular duties of his office; such pro bono representation must be at no cost to the

state of North Dakota;

5. Appeared, while state's attorney or assistant state's attorney of any county of this state or while an employee in the office of the state's attorney, as an attorney for the defense in any criminal action which it was his duty to prosecute;

6. Been convicted of any offense mentioned in section 27-13-08, 27-13-09, 27-13-11, or 27-13-12; or

7. Committed any other act which tends to bring reproach upon the legal profession. The enumeration of certain grounds for disbarment or suspension of attorneys at law may not be deemed a limitation upon the general powers of the supreme court to suspend or disbar for professional misconduct.

Rule 3.5 of the North Dakota Rules of Professional Conduct provides:

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law including ex parte communications concerning a pending or impending proceeding; or

(b) engage in conduct intended to disrupt a tribunal.

Rule 8.4 of the North Dakota Rules of Professional Conduct provides:

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate these rules, knowingly assist or induce another to do so, or do so through the acts of another;

(b) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(c) state or imply an ability to influence improperly a government agency or official;

(d) engage in conduct that is prejudicial to the administration of justice, including to knowingly manifest through words or conduct in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation, against parties, witnesses, counsel or others, except when those words or conduct are legitimate advocacy because race, sex, religion, national origin, disability, age, or sexual orientation is an issue in the proceeding;

or

(e) engage in other conduct that is enumerated in the North Dakota Century Code as a basis for revocation or suspension of a lawyer's certificate of admission.

STATEMENT OF THE CASE

Petitioner Jonathan T. Garaas is a member of the North Dakota Bar Association. In this petition, Garaas seeks review of a decision of the Supreme Court of North Dakota that authorizes a public reprimand against him for the content of his speech addressed to a judge in post-judgment court proceedings occurring on January 2 and January 5, 2001. The sanction of a public reprimand was authorized by the Supreme Court of North Dakota based solely upon *content of courtroom speech* which Garaas submits is core speech under the First Amendment, and the type of speech that our Founding Fathers intended to fully protect. The sanction was authorized without pleadings, or factual findings, that the content of Garaas's speech was (a) knowingly untrue, (b) recklessly made in disregard of the truth, (c) criminal in nature, or (d) disruptive in nature.

It is noted that certain earlier courtroom speech occurring in a hearing held in November, 2000, addressed to the judge and informing the court that an opposing counsel's statement was a lie, was also the subject of the disciplinary action. Charges relating to the November, 2000, speech were successfully defended by Garaas by showing the truth of Garaas's statement.

In January, 2001, Garaas was representing TAG Investments in a dispute concerning an option to purchase certain lands in Fargo, North Dakota. The dispute over the option to purchase, its terms, and the meaning of the first judgment concerning the option, devolved into prolonged litigation. The reported cases involving this prolonged litigation include: Matrix Properties Corp. v. JCG Investments, L.L.C., 2002 ND 99, 647 N.W.2d 706, *cert. denied* ___ U.S. ___, 123.S. Ct. 448; Matrix Properties Corporation v. TAG Investments, 2002 ND 86, 644 N.W.2d 601, *cert. denied* __U.S. ___, 123 S. Ct. 448; Matrix Properties Corporation v. TAG Investments, 2002 ND 119, 651 N.W.2d 692, *cert. denied* ___ U.S. ___, 123 S. Ct. 448; Matrix Properties Corp. v. TAG Investments, 2001 ND 128, 636 N.W.2d 674; Matrix Properties Corp. v. TAG Investments, 2000 N.D. 213, 622 N.W.2d 432; Matrix Properties Corp. v. TAG Investments, 2000 ND 88, 609 N.W.2d 737.

In January, 2001, the second appeal to the Supreme Court of North Dakota was still pending. The second appeal stemmed from a lower court order issued in June, 2000, determining that Matrix Properties Corporation did not need to pay TAG Investments certain annual option payments that were due in February, 2000, three months after the November 2, 1999, Judgment. In the second appeal to the Supreme Court of North Dakota, Garaas's clients, who still had not been paid any monies for the purchase price, were contending: (a) the lower court no longer had jurisdiction because there was no remand from the first appeal other than to assess costs of appeal; (b) there was no prior finding in either the first appeal, the underlying Judgment of November 2, 1999, or the original Memorandum Opinion of the

lower court that expressly held the certain July, 1999, notices created a binding executory contract, and that the first appeal was limited to whether Matrix Properties Corporation's June, 1999, purchase of twenty acres kept the option alive; (c) based upon the terms of the under lying option agr eement certain option monies were due even if there was an executory contract; and (d) their right to due process was violated based upon shortened notice, the claimed amendment of a final judgment, and a belief that the opposing party must present the issue in a new lawsuit, and not by way of a post-judgment motion unsupported by any evidence.

In October and November, 2000, while the second appeal was still pending, Matrix Properties Corporation moved the lower court to require TAG Investments to provide deeds to the property or declare the judicial transfer of the property. Matrix Properties Corporation's motion was not supported by evidence. TAG Investments resisted Matrix Properties Corporation's motion believing that the requested relief would not be enforcing the judgment, but rather, altering the terms of the judgment while on appeal. TAG Investments also supported its resistance to the motion by a comprehensive affidavit of one of the partners of TAG Investments who testified as to events occurring subsequent to the November 2, 1999, Judgment. TAG Investments, through its partner's affidavit, attempted to establish that Matrix Properties Corporation's proposed closing was a substantial deviation from the terms of the underlying Option to Purchase, and, that Matrix Properties Corporation, who had not tendered any monies, was in default.

On November 7, 2000, the lower court

determined it did not need to consider any fact because it was a post-judgment motion, and therefore, the lower court refused to consider the unchallenged facts submitted by TAG Investments establishing Matrix Properties Corporation's noncompliance with the Option to Purchase. On November 8, 2000, the lower court issued an order authorizing an amended judgment requiring TAG Investments and its partner to execute a warranty deed and quit claim deed, obtain quit claim deeds from non-parties, and deliver all such deeds to Matrix Properties Corporation by November 15, 2000.

Because the lower court authorized an amendment of the November 2, 1999, Judgment while on appeal, and the unprecedented legal position taken by the lower court that a factual hearing was not necessary to resolve facts that occurred subsequent to November 2, 1999 -- the date of the original judgment, now supposedly final since June, 2000 -- TAG Investments and its partner again sought a Supervisory Writ from the Supreme Court of North Dakota which was denied without comment. For this reason, TAG Investments and its partner believed it was necessary to attempt to have the United States District Court for North Dakota assume jurisdiction in an attempt to protect themselves from their perceived violations of due process of law, equal protection of law, and other civil rights. TAG Investments and its partner's petition for removal to federal court was denied, orally, on December 15, 2000. Federal removal was denied shortly after the Supreme Court of North Dakota's second decision concerning the Option to Purchase in Matrix Properties Corp. v. Tag Investments, 2000 ND 213, 622 N.W.2d 432.

After federal removal was denied on December 15, 2000, TAG Investments and a partner appealed the November 8, 2000, order (that still had not been reduced to the amended judgment) to the Supreme Court of North Dakota. In December, 2000, Garaas, on behalf of his clients, timely petitioned the Supreme Court of North Dakota for rehearing on grounds that the December 12, 2000, decision misidentifies the issues on appeal. The Petition for Rehearing was denied by the Supreme Court of North Dakota on February 5, 2001. Thus, the Supreme Court of North Dakota had maintained appellate jurisdiction of matters relating to the Option to Purchase at the time Garaas made his in-court speech to the lower court judge.

On January 2, 2001, a pre-motion status conference was held in the lower court without any prior indication to Garaas or his clients, as to the reason for the pre-motion status conference arranged between the lower court judge and the other counsel. It is at this status conference that the first sanctioned statement by Gar aas was m ade. The sanctioned statement occurred when Garaas responded to the judge's question as to whether Garaas's clients would sign deeds if the court orders them to do so. Garaas's lengthy answer to the judge's hypothetical question is set forth in Appendix pages 112 through 115. Garaas asserts that the sanctioned January 2, 2001, speech was (a) true as to all facts stated therein, (b) contained matters of his opinion based upon the facts as he knew them to be, and (c) were necessary statements at the time made to preserve the rights of his clients.

On January 5, 2001, the lower court held a "Court Overseen Closing." It is in this proceeding that

the last two sanctioned statements were made. The initial sanctioned statement arising in the January 5, 2001, proceeding, was made by Garaas when he paraphrased, to the lower court judge, the content of his Petition for Rehearing concerning the Supreme Court of North Dakota's December 12, 2000, decision. Garaas's entire paraphrase of the Petition for Rehearing is set forth on Appendix pages 117 through 120. Garaas was also sanctioned for a colloquy consisting of questions and statements made to the judge in an attempt to determine if the lower court judge had heard from the Supreme Court of North Dakota as to whether the December 12, 2000, decision was final, modified, or if his Petition for Rehearing was denied. The colloquy is set forth on Appendix pages 121 through 124.

As to the statements or colloquy within the January 5, 2001, proceeding, Garaas asserts (a) such were true as to facts stated therein, (b) the opinions found within the statements were based upon the law and facts as he knew them to be, (c) and such were necessary statements to preserve the rights of his clients, including their right to appeal.

Both Disciplinary Counsel's Petition for Discipline and the Report of Hearing Panel and Order of Reprimand based the disciplinary proceedings and the sanctions on the *content* of Garaas's speech. Appendix, pages 103 through 108; pages 22 through 29.

There was no evidence in the record, nor factual findings made, that Garaas's speech (a) was made with an intent to disrupt the court proceedings, or (b) in any way actually disrupted court proceedings. The

following testimony of Judge Racek in the disciplinary hearing establishes that Garaas's non-speech conduct was never an issue in the disciplinary proceedings:

> Q. [Panel Member Fischer] Right, right. Okay. Why didn't you sanction Mr. Garaas for contempt?
> A. [Judge Racek] In what instance?
> Q. In any of the instances that are the subject to the petition for discipline.
> A. The Court was attempting to resolve the matter the best it could, and on January 2 the Court was still hopeful the parties could resolve the matter. On January 5 when it became apparent that the Court was going to have to resolve the matter Mr. Garaas did comply with the directive of the Court in the transcript to continue no further in the argument that he was making and the Court was able to complete its business. (Transcript of January 8, 2002, page 63)

REASONS FOR GRANTING THE WRIT

There are compelling reasons for this Court to grant Garaas's petition for writ of certiorari. The Supreme Court of North Dakota, relying upon Berner v. Delahanty, 129 F.3rd 20 (1st Cir. 1997), has determined the right of the lawyer to speak and address the court on behalf of his client in court proceedings is no greater than his right to wear a political pin upon his lapel in a courtroom. In so ruling, the Supreme Court of North Dakota has decided an important question of federal law that conflicts with the decisions of this Court and federal

appellate courts concerning the First Amendment, warranting review in the form of a writ of certiorari.

The First Amendment, applied to the States by the Fourteenth Amendment "protects vigorous advocacy, certainly of lawful ends against government intrusion." N.A.A.C.P. v. Button, 371 U.S. 415, 429 (1963). The First Amendment shields speech that may be critical of judges as an individual or a court as an institution. In re Little, 404 U.S. 553, 555 (1972). Any danger Garaas's speech posed to the administration of justice should not only have been plead by Disciplinary Counsel, but proven. In re McConnell, 370 U.S. 230 (1962).

The decision of the Supreme Court of North Dakota conflicts with decisions of the United States Supreme Court, including Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), and its progeny. Garaas's words were directed at courts as institutions or at public officials concerning whether their actions violated constitutional rights of his clients. "There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." Gentile v. State Bar of Nevada, *supra.*, at page 1034. The decision of the Supreme Court of North Dakota also conflicts with Garrison v. Louisiana, 379 U.S. 64 (1964) because it authorizes punishment of a lawyer for criticism of a court or judge without a showing that the lawyer's statement were untrue. The decision of the Supreme Court of North Dakota conflicts with Old Dominion Branch No. 496 v. Austin, 418 U.S. 264 (1974) because the decision punishes mere rhetorical hyperbole without showing the speech was made with a reckless disregard for the truth. The decision of the Supreme Court of North

Dakota conflicts with Craig v. Harney, 331 U.S. 367 (1947) because it punishes speech without showing the speech constitutes an imminent threat to the administration of justice or brings reproach upon the profession.

The rules and statutes claimed to be violated by Garaas are too broad, and vague, and if the public reprimand remains in place it will wrongfully restrict the free speech rights of lawyers guaranteed by the First and Fourteenth Amendment to the Constitution of the United States of America. The subject statutes and rules are not narrowly drawn, and if the decision of the Supreme Court of North Dakota is allowed to stand, the independence of the bar is seriously jeopardized. Garaas was sanctioned solely because the Supreme Court of North Dakota disapproved of the content of his speech even though the First Amendment should prohibit any branch of government from proscribing speech based upon the disapproval of its content. R.A.V. v . St. Paul, 505 U.S. 377 (1992). If the decision is not reviewed, lawyers will tend to steer far clear of controversial constitutional subjects involving a judicial branch's actions because the line between the permissible and impermissible is not clearly marked. Without review by this Court, a lawyer who earnestly believed that the judiciary of North Dakota was violating federal rights of his clients will remain punished because the North Dakota courts were not comfortable with his message.

The decision of the Supreme Court of North Dakota conflicts with Circuit Court decisions, such as Standing Committee on Discipline v. Yagman, 55 F.3rd 1430 (9th Cir. 1995), because it punishes constitutionally protected speech based upon overly

broad ethical rules and statutes without reading into the rule or statutes the requirement of proving malice or a reckless disregard for the truth. The decision of the Supreme Court of North Dakota punishes Garaas for speech without evidence, or even an allegation and subsequent factual findings, that Garaas's statements were made knowingly untrue, or with a reckless disregard for the truth. Lawyers cannot be punished for every statement that they might make that happens to turn out to be incorrect, but only punished for statements that are made knowingly falsely or with reckless disregard of their truth or falsity. See, In the Matter of Palmisano, 70 F.3rd 483, 487 (7th Cir. 1995).

The Supreme Court of North Dakota's decision to authorize a public reprimand for a lawyer's in-court advocacy establishes that this Court must clarify its wording contained in Gentile v. State Bar of Nevada, *supra.*, at page 1071:

> It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal.

Garaas submits that he did not cross the line that makes speech sanctionable. Garaas submits that the North Dakota Supreme Court's decision that punishes content of speech without requiring a showing of the disregard for truth on the part of the advocate blurs the line between the protected and unprotected. In searching for a more definite

demarcation of the line between advocacy and misconduct the words of Hallinan v. The Superior Court of Kings County, 240 P. 788, 790 (Cal. Ct. Of App., 2nd District, Division 1, 1925) are still pertinent:

> We have not been able to find any adjudicated case directly in point. It must be conceded that an attorney engaged in the trial of an action in court has certain rights and privileges, the full exercise of which can neither be abridged nor denied him by the court. He also has certain duties to perform to his client which are beyond the control of the court. Among these rights and duties of the attorney is his right, within reasonable limits, to address the court and to present argument upon questions arising during the progress of the trial. This right to argue a matter before the court, however, is not unlimited. It must be exercised under the direction of the court and within such limits as may be prescribed by the court in the exercise of its discretion to regulate such matters. Otherwise, an attorney might delay and impede the trial of a case far beyond any legitimate limits. Argument of counsel, upon questions arising during the progress of a trial, is addressed solely to the court and its object and purpose is to enable the court to have the benefit of the views of counsel upon the questions under discussion in order that the court may be better advised upon such questions before it is called upon to

> decide them. The court, rather than the attorneys in the case, must be the judge as to the extent and scope of such argument.

Since the truth of Garaas's speech was never put in issue, nor questioned by any authority vested with disciplinary powers, such speech cannot be punished. Garaas was disciplined for merely advocating federal issues to a North Dakota court under the oath of his office as a practicing attorney.

In Sacher v. U.S., 343 U.S. 1, 13 (1952), this Court promised the nation's lawyers that when this Court's aid is needed, it "will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever."

The duties that a lawyer owes his client as an advocate cannot be likened to a political pin upon his lapel. Petitioner Jonathan T. Garaas prays that this Court honor its promise to protect him for merely speaking the truth, giving his truthful opinions as to the law as he sees it to be, and asking questions in a court of law while acting as an advocate.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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No. _____

IN THE

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On Petition For Writ of Certiorari
To The Supreme Court of North Dakota

Appendix to Petition for Writ of Certiorari

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Supreme Court, Rule 14(i)(i). Opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, entered in conjunction with the judgment sought to be reviewed.

In the Matter of Disciplinary Action Against Jonathan T. Garaas, a Member of the Bar of the State of North Dakota, 202 ND 181, 652 N.W.2d 918.....App. 1

Supreme Court, Rule 14(i)(ii). Any other relevant opinions, orders, findings of fact, and conclusions of law entered in the case by courts or administrative agencies.

Report of Hearing Panel and Order of Reprimand.....App. 21

Supreme Court, Rule 14(i)(iii). Any order on rehearing.

Supreme Court, Rule 14(i)(iv). The judgment sought to be reviewed if the date of its entry is different from the date of the opinion or order required in sub-subparagraph (i) of this subparagraph.

Supreme Court, Rule 14(i)(v). Material required by subparagraphs 1(f) or 1(g)(i). Identification of federal

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2. Petitioners raise federal questions in the appeal to the North Dakota Supreme Court arising out of the disciplinary process.

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Brief of Respondent.....App. 63

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Supreme Court, Rule 14(i)(vi). Any other material the petitioner believes essential to understand the petition.

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In the Supreme Court

State of North Dakota

2002 ND 181

In the Matter of Disciplinary Action Against Jonathan T. Garaas, a Member of the Bar of the State of North Dakota

Paul W. Jacobson, Disciplinary Counsel, Petitioner
v.
Jonathan T. Garaas, Respondent

No. 20020103

Jonathan T. Garaas, Petitioner
v.
Disciplinary Board of the Supreme Court of the State of North Dakota, Respondent.

No. 20020113

In re Garaas

Per Curiam.

[¶ 1] Jonathan T. Garaas and Disciplinary Counsel have both petitioned for review of a hearing panel's report and order of reprimand, which found Garaas had violated the North Dakota Rules of Professional Conduct and ordered that Garaas be publicly reprimanded and pay costs of the disciplinary proceeding. We conclude Garaas has violated N.D.R. Prof. Conduct 3.5(a), 3.5(b), and 8.4(e), and we order

that he be publicly reprimanded and pay the costs of the disciplinary proceedings in the amount of $7,312.42.

I

[¶ 2] Garaas has represented TAG Investments in lengthy and contentious litigation with Matrix Properties Corporation over a disputed option to purchase real estate. That litigation has spawned numerous appeals. See Matrix Properties Corp. v. JCG Investments, L.L.C., 2002 ND 99, 647 N.W.2d 706; Matrix Properties Corp. v. TAG Investments, 2002 ND 86, 644 N.W.2d 601; Matrix Properties Corp. v. TAG Investments, 2001 ND 128, 636 N.W.2d 674; Matrix Properties Corp. v. TAG Investments, 2000 ND 213, 622 N.W.2d 432; Matrix Properties Corp. v. TAG Investments, 2000 ND 88, 609 N.W.2d 737. This disciplinary proceeding arose out of Garaas's conduct at post-judgment proceedings in the Matrix litigation occurring in November 2000 and January 2001.

[¶ 3] At a November 7, 2000, hearing on Matrix's motion to compel transfer of the real estate, Garaas made repeated assertions that opposing counsel was making false representations of fact and had lied to the court. Garaas at one point stated:

> Your Honor, I cannot let it go by one more time because Mr. Spaeth just lied to you one more time. . . . That representation by Mr. Spaeth is an absolute falsehood and he can't get away with it anymore. . . . And we will never accept Mr. Spaeth's false representation in violation of the Canons and in violation of every concept of due process that I know.

[¶ 4] At status conference on January 2, 2001, Garaas argued the court lacked jurisdiction in the matter because there was an appeal pending in this Court. The trial judge asked Garaas if his client would sign deeds conveying the disputed property if ordered to do so by the court at a court-supervised closing scheduled for January 5, 2001. In responding to the court's question, Garaas suggested that the trial judge was placing himself "at risk":

> There is a lot of things that are going to have to be resolved, and I guess frankly I have a question in my mind as to whether or not the Court wants to enter into a course of action that places the trial court judge and the State of North Dakota at risk. . . .
>
> So when you ask me a question as to whether or not we are going to sign a deed, there are so many things that still have yet to be resolved that why would the Court want to put this Court and the State of North Dakota at risk when we are guaranteed to have another lawsuit, guaranteed to have another trial to determine whether or not there has been damages or a quiet title action and establish what the record is for this property.

[¶ 5] On January 5, 2001, the court held a "Court Overseen Closing" to convey the disputed property. At the outset of that proceeding, the trial court stated it was acting pursuant to this Court's December 12, 2000, opinion in Matrix Properties, 2000 ND 213, 622 N.W.2d 432, in which we summarily affirmed an earlier post-judgment order and directed the trial court

"to order specific performance requiring TAG and Grettum to convey the subject property upon tender by Matrix of the purchase price set in the 1996 option agreement." Garaas again argued the trial court lacked jurisdiction to order conveyance of the property, and asserted this Court had falsely represented the issues in the prior appeal:

> The first issue was that the North Dakota Supreme Court has wrongfully identified the issue on appeal. Actually they made a false representation of what the issue was being appealed.

[¶ 6] At the January 5 hearing Garaas was allowed to argue at length, challenging jurisdiction of the trial court and whether Matrix had complied with the terms of the option. The court ultimately determined Matrix was prepared to tender payment of the purchase price and indicated it was TAG's "last chance" to execute deeds conveying the property or it would be judicially conveyed. The court then asked Garaas and his client, "Do you wish to comply with the order of the Court to convey this property?" After Garaas again reiterated his argument that Matrix had failed to comply with the option and the option had expired, the following colloquy occurred between Garaas and the court:

> THE COURT: The Defendant -- the Defendant's counsel [Garaas] in the presence of the Court has informed the Court that they'll not comply with the Court's order. Proceed.
>
> MR. GARAAS: Which Court order are you talking about, Your Honor?

THE COURT: The order to convey it's [sic] property.

MR. GARAAS: Which one was that, Your Honor?

THE COURT: The one they just made.

MR. GARAAS: At this point in time?

THE COURT: Yes.

MR GARAAS: On what legal basis, Your Honor?

THE COURT: Enough. Sit. Enough.

MR. GARAAS: On what legal basis? I only ask that this Court identify on what legal basis it acts, because my client has a right to know. My client has a right to due process of law, Your Honor.

THE COURT: Proceed.

MR. GARAAS: You will not answer my question, Your Honor?

THE COURT: Mr. Garaas, I've already put on the record that we're proceeding pursuant to the Supreme Court's directive of December 12th.

MR. GARAAS: And how does the court get around the fact that it isn't a final Supreme Court order and the mandate has not been returned to you and jurisdiction still is at the Supreme Court, Your Honor? How can this Court act in derogation of it's [sic] duties to honor the

fact that jurisdiction is now at the Supreme Court level not back here. This Court can't act, Your Honor, on the basis of the December 12, 19 -- of the year 2000 decision of the Supreme Court. How can the Court act when it doesn't have jurisdiction based upon that order, Your Honor? My client would like to know.

THE COURT: The Court's been directed by the Supreme Court to proceed. The Supreme Court directs the District Court what to do. I am proceeding under that directive.

MR. GARAAS: Is there a directive that's different than the December 12, 2000, order, Your Honor? Has there been direct communication between the Supreme Court and this Court that is not of record and not reported on December 12th. Because there is no such directive other than the December 12th and that's not a final order. Is there a directive from the Supreme Court to this Court to proceed today that is not placed of record, Your Honor? Have you had telephone conversations with any member of the Supreme Court?

THE COURT: Mr. Garaas, of course not. But this now is getting to be ridiculous. You've tried these arguments now in front of eight different judges, five in the Supreme Court, Judge Erickson, this Court, Judge Webb. It's over now so we're gonna proceed. Go ahead.

MR. GARAAS: Has there been communications with any representative of the Supreme Court of North Dakota?

THE COURT: Sit down now, Mr. Garaas. Proceed.

MR. GARAAS: May I -- my client and I would like to know, Your Honor.

THE COURT: Mr. Garaas, this is the last time now before I ask you to be removed from the Court. We're gonna proceed with the hearing. Your partner will have to sit in your place. But this is beyond any appropriate measure of conduct for an attorney.

MR. GARAAS: I merely wanted to know what jurisdiction the Court was exercising, Your Honor.

THE COURT: Proceed.

[¶ 7] The court ultimately ordered judicial conveyance of the property. At the conclusion of the January 5 hearing, the trial court stated:

The Court's repeatedly heard arguments as to deficiencies in the Plaintiff's attempt to close this matter but these matters have been adjudicated or have no merit. The Defendants' arguments from the Court's perspective are for the purposes of delay. . . .

. . . .

This has been a case that's involved a lot of patience I guess on all parties involved. The Court's been disappointed in some of the conduct exhibited here with the way other

> officers of the Court have been treated, the way this Court and the Supreme Court has been referred to in these proceedings as doing or considering anything inappropriate.

[¶ 8] At the disciplinary hearing, the trial judge characterized Garaas's behavior as "threatening," "defiant," and "obstructionist," and stated "I didn't view him as attempting to help the Court resolve the matter on a legal basis." When asked about Garaas's comment that the judge might be putting himself "at risk," the judge testified he perceived it "as a threat to sue me personally" and "viewed it as an attempt to stop or delay the process of the Court's attempt to enforce the judgment."

[¶ 9] A petition for discipline was served charging Garaas with violations of N.D.R. Prof. Conduct 3.5(a), 3.5(b), 4.4 , and 8.4(e) , and N.D.R. Lawyer Discipl. 1.2(A)(8) . The hearing panel concluded Garaas's "at risk" comments and the lengthy colloquy with the trial court during the January 5 hearing violated the disciplinary rules. The hearing panel further concluded Garaas's statement that Mr. Spaeth had lied did not constitute a breach of N.D.R. Prof. Conduct 4.4, and that Garaas's statement that this Court had made a false representation, while improper, had not been pleaded as a basis for discipline. Taking into consideration substantial mitigating circumstances, the hearing panel ordered that Garaas be publicly reprimanded and that he pay the costs of the disciplinary proceedings in the amount of $7,312.42. Both Garaas and Disciplinary Counsel petitioned for review of the hearing panel's report and order of reprimand. We granted the petitions for review.

[¶ 10] The hearing panel had jurisdiction under N.D.R. Lawyer Discipl. 3.1(E). Garaas and Disciplinary Counsel timely filed petitions for review under N.D.R. Lawyer Discipl. 3.1(F)(1). This Court has jurisdiction under N.D.R. Lawyer Discipl. 3.1(F)(1).

II

[¶ 11] We review disciplinary proceedings de novo on the record. In re Edwardson, 2002 ND 106, ¶ 9, 647 N.W.2d 126; In re Crary, 2002 ND 9, ¶ 7, 638 N.W.2d 23. We accord due weight to the findings and conclusions of the hearing panel, but we do not act as a mere rubber stamp. Edwardson, at ¶ 9; In re Swanson, 2002 ND 6, ¶ 6, 638 N.W.2d 240.

[¶ 12] Rule 3.1(F)(1), N.D.R. Lawyer Discipl., requires the petition for review of a hearing panel's order of reprimand to contain "a clear statement of the reasons petitioner believes the panel's decision is arbitrary, capricious, or unreasonable." That language is relevant only to our initial determination whether to grant the petition for review. If the petition is granted, and briefing and oral argument are ordered under N.D.R. Lawyer Discipl. 3.1(F)(1), we employ our traditional de novo review in determining whether discipline is warranted and the appropriate sanctions to be assessed. See Toth v. Disciplinary Board, 1997 ND 75, ¶¶ 10-11, 562 N.W.2d 744 (the "arbitrary, capricious, or unreasonable" standard under N.D.R. Lawyer Discipl. 3.1(D)(8) governs only the initial determination whether to grant leave to appeal from an informal disposition, and this Court will review the substantive evidence and the merits de novo on the record).

[¶ 13] Disciplinary Counsel bears the burden of proving each alleged violation of the disciplinary rules by clear and convincing evidence. Edwardson, 2002 ND 106, ¶ 9, 647 N.W.2d 23; Crary, 2002 ND 9, ¶ 7, 638 N.W.2d 23. Each disciplinary case must be considered on its own facts to decide what discipline is warranted. Edwardson, at ¶ 9; Swanson, 2002 ND 6, ¶ 6, 638 N.W.2d 240.

III

[¶ 14] Disciplinary Counsel argues the hearing panel erred in concluding that Garaas's statements about this Court making false representations "were not part of the petition for discipline."

[¶ 15] The hearing panel did not explain the basis for its conclusion these statements were not part of the petition for discipline. The petition for discipline quoted Garaas's statements that this Court had "wrongfully identified the issue on appeal" and had "made a false representation of what the issue was being appealed." The petition alleged Garaas's conduct violated N.D.R. Prof. Conduct 8.4(e), which provides it is professional misconduct to engage in conduct that is a basis for revocation or suspension of a lawyer's certificate of admission, and N.D.C.C. § 27-13-01(1), which provides that an attorney shall maintain respect for courts of justice and judicial officers.

[¶ 16] Although there is no dispute that the petition alleges that Garaas made the statements about this Court, Garaas contends that the petition failed to specifically detail the statutes and rule that would make his conduct sanctionable. Garaas claims the pleading is defective because it fails to specifically

enumerate N.D.C.C. § 27-14-02(3), which is a necessary middle step between Rule 8.4(e) and N.D.C.C. § 27-13-01(1).

[¶ 17] In order to place Garaas's argument in context, a brief overview of the interplay between the rule and statutes is helpful. Rule 8.4(e) provides that it is professional misconduct for a lawyer to "engage in other conduct that is enumerated in the North Dakota Century Code as a basis for revocation or suspension of a lawyer's certificate of admission." Section 27-14-02(3), N.D.C.C., provides that a lawyer's certificate may be revoked or suspended if he willfully violates any of the duties of an attorney or counselor at law. Section 27-13-01(1), N.D.C.C., enumerates the duties of attorneys, and provides that every lawyer and counselor at law shall "[m]aintain respect for courts of justice and judicial officers." Thus, an attorney may be sanctioned for failing to maintain respect for the court.

[¶ 18] Garaas contends the petition failed to properly plead a violation based upon Garaas's statements because it did not specifically refer to N.D.C.C. § 27-14-02(3). Our rules for pleading in disciplinary proceedings are not so strict and arcane. Rule 3.1(E)(1), N.D.R. Lawyer Discipl., provides that the petition must be "sufficiently clear and specific to inform the lawyer of the alleged misconduct." In addition, N.D.R. Lawyer Discipl. 3.5(B) provides that, except as otherwise provided and insofar as appropriate, the North Dakota Rules of Civil Procedure apply in disciplinary proceedings. See In re Howe, 2001 ND 7, ¶ 7, 621 N.W.2d 361. Under the civil rules, a pleading is sufficient if it contains (1) a short, plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for the relief the

pleader seeks. N.D.R.Civ.P. 8(a); Kaler v. Kraemer, 1998 ND 56, ¶ 7, 574 N.W.2d 588; In re Estate of Hill, 492 N.W.2d 288, 296 (N.D. 1992).

[¶ 19] Both N.D.R. Lawyer Discipl. 3.1(E)(1) and N.D.R.Civ.P. 8(a) adopt notice pleading, where the purpose is to place the party on notice as to the nature of the pleader's claim, and pleadings that indicate generally the type of claim that is involved are sufficient. See Estate of Hill, 492 N.W.2d at 296; Jablonsky v. Klemm, 377 N.W.2d 560, 565 (N.D. 1985). Pleadings are to be liberally construed to do substantial justice. See N.D.R.Civ.P. 8(f); Kaler, 1998 ND 56, ¶ 7, 574 N.W.2d 588; Estate of Hill, at 296. Under these liberal pleading rules, a pleading need not specifically allege every element of the claim. Kaler, at ¶ 7; Jablonsky, at 565.

[¶ 20] The petition for discipline in this case unambiguously placed Garaas on notice of the nature of the "claim" against him. The specific facts were alleged, including quotation of the exact statements alleged to have violated the rules. The petition further specified that Garaas's conduct violated N.D.C.C. § 27-13-01(1) and N.D.R. Prof. Conduct 8.4(e). Any doubt whether violation of a duty of an attorney under N.D.C.C. § 27-13-01 was a sanctionable offense is dispelled by the Comment to N.D.R. Prof. Conduct 8.4, which specifically enumerates N.D.C.C. § 27-13-01 as one of the statutes providing the basis for revocation or suspension of a lawyer's certificate of admission, and thus for sanctions under the rule. Furthermore, this Court has explicitly stated that failure to maintain respect for the court under N.D.C.C. § 27-13-01(1) will provide the basis for sanctions under N.D.R. Prof. Conduct 8.4(e). See In re Gronneberg, 2001 ND 158, ¶

12, 634 N.W.2d 491.

[¶ 21] We conclude the petition adequately placed Garaas on notice of the nature of the allegations against him and satisfied the requirements of N.D.R. Lawyer Discipl. 3.1(E)(1) and N.D.R.Civ.P. 8(a).

IV

[¶ 22] There is no real factual dispute about Garaas's conduct. All of the alleged misconduct consisted of statements made in open court, and Garaas does not dispute the accuracy of the transcripts of what he said. The dispositive issue is whether Garaas's conduct constituted ethical violations. Garaas contends that his conduct during the hearings did not violate the disciplinary rules, but was merely zealous representation of his client.

[¶ 23] Garaas argues that his conduct, while perhaps at times impolite, was merely zealous representation of his client. "[A] lawyer is not always protected by following the client's specific directions." In re Boulger, 2001 ND 210, ¶ 27, 637 N.W.2d 710 (Sandstrom, J., concurring). Not every lawyer excess is justified by the mantra of zealous representation.

[¶ 24] The Comment to N.D.R. Prof. Conduct 3.5 explains:

> The lawyer's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the lawyer's right to speak on behalf of litigants. . . . A lawyer can present the cause, protect the

> record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Similarly, the Supreme Court of Minnesota has stated:

> Respondent asserts he has a right, indeed an obligation, to represent his clients vigorously, aggressively, and zealously. To be vigorous, however, does not mean to be disruptively argumentative; to be aggressive is not a license to ignore the rules of evidence and decorum; and to be zealous is not to be uncivil.

In re Williams, 414 N.W.2d 394, 397 (Minn. 1987).

[¶ 25] There is a line of demarcation between zealous representation of a client and unethical conduct.

V

[¶ 26] Garaas argues the statements he made are protected under the First Amendment and he cannot be sanctioned for exercising his right to free speech. Relying upon Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), Garaas argues "an attorney may not be disciplined based solely on his/her speech unless such speech becomes so extreme as to become prejudicial to the administration of justice."

[¶ 27] Garaas has misread Gentile. While the Court concluded that a lawyer's out-of-court speech could be the basis for disciplinary sanctions if it creates a "substantial likelihood of material prejudice" in a pending case, see id. at 1074-75, the Court noted that a lawyer's free speech rights in a courtroom are even

more limited:

> It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal.

Id. at 1071.

[¶ 28] The First Amendment does not preclude sanctioning a lawyer for intemperate speech during a courtroom proceeding. Addressing Gentile in a disciplinary proceeding, the Supreme Court of Missouri concluded:

> An attorney's free speech rights do not authorize unnecessary resistance to an adverse ruling . . .. Once a judge rules, a zealous advocate complies, then challenges the ruling on appeal; the advocate has no free-speech right to reargue the issue, resist the ruling, or insult the judge.

In re Coe, 903 S.W.2d 916, 917 (Mo. 1995).

[¶ 29] The United States Court of Appeals for the First Circuit, addressing a lawyer's claim of free speech rights in the courtroom, noted:

> A courthouse—and, especially, a courtroom—is a nonpublic forum. A courtroom's very function is to provide a locus in which civil and criminal disputes can be adjudicated. Within this staid environment, the presiding judge is charged with

> the responsibility of maintaining proper order and decorum. In carrying out this responsibility, the judge must ensure "that [the] courthouse is a place in which rational reflection and disinterested judgment will not be disrupted."

Berner v. Delahanty, 129 F.3d 20, 26 (1st Cir. 1997) (citations omitted) (quoting Ryan v. County of DuPage, 45 F.3d 1090, 1095 (7th Cir. 1995)).

[¶ 30] A lawyer's right to exercise free speech does not permit a lawyer appearing in a judicial proceeding in open court to call opposing counsel a liar, to threaten a judge with personal liability if he rules a certain way, to accuse an appellate court of false misrepresentation, or to engage in a lengthy, disruptive, belligerent, and disrespectful exchange with the court. We conclude that sanctioning Garaas for his statements during the post-judgment proceedings does not violate his right to free speech.

VI

A

[¶ 31] At the November 7, 2000, hearing, Garaas accused opposing counsel of lying to the court. Disciplinary Counsel argues this conduct violated N.D.R. Prof. Conduct 3.5(b) and 4.4.

[¶ 32] Rule 4.4, N.D.R. Prof. Conduct, requires that, "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or burden a third person." Rule 3.5(b), N.D.R. Prof. Conduct, states that a lawyer "shall not ... engage in conduct intended to disrupt a tribunal." The

commentary to Mod. R. Prof. Conduct 3.5(c), which is identical to N.D.R.Prof. Conduct 3.5(b) , indicates that, "[a]lthough there is no bright-line rule defining conduct violative of Rule 3.5(c) , disruptive conduct is commonly evaluated in light of the totality of the circumstances." American Bar Association Center for Professional Responsibility, Annotated Model Rules of Professional Conduct 343 (3d ed. 1996).

[¶ 33] Garaas's conduct in accusing opposing counsel of lying to the court was reprehensible. See Johnson v. Johnson, 544 N.W.2d 519, 522 (N.D. 1996). Viewing this conduct in light of the totality of the circumstances, however, we do not conclude there was a violation of N.D.R. Prof. Conduct 3.5(b) or 4.4, and Disciplinary Counsel has not ar gued the conduct violated other provisions.

B

[¶ 34] At the January 2, 2001, status conference, Garaas warned the trial judge that he would be placing himself "at risk" if he continued with the proceedings and ordered Garaas's client to sign the deeds. Garaas's statement was a clear threat to sue the judge personally. At the disciplinary hearing, the trial judge testified he perceived Garaas's statements "as a threat to sue me personally" and "viewed it as an attempt to stop or delay the process of the Court's attempt to enforce the judgment." Rule 3.5(a), N.D.R. Prof. Conduct, states that a lawyer shall not "seek to influence a judge . . . by means prohibited by law." A judge must be free to determine cases based upon the evidence and applicable law, without threats of potential personal liability. See N.D. Code Jud. Conduct Canon 3(B)(2) Garaas's threat that the judge

was placing himself "at risk" violated N.D.R. Prof. Conduct 3.5(a).

C

[¶ 35] At the January 5, 2001, hearing, Garaas stated that this Court had "made a false representation of what the issue was" in an earlier appeal. Section 27-13-01(1), N.D.C.C., provides that a lawyer must "[m]aintain respect for courts of justice." As previously discussed, a violation of a lawyer's duty under N.D.C.C. § 27-13-01(1) is sanctionable under N.D.R. Prof. Conduct 8.4(e) . While a lawyer is certainly free to register his disagreement with a court's ruling, he must do so without showing disrespect to the court. Garaas's statement that this Court made a "false representation" carries a connotation of intentional wrongful conduct. We conclude Garaas's statement crossed the line beyond criticism to disrespectful assertion of wrongdoing by the Court, and constitutes a violation of N.D.R. Prof. Conduct 8.4(e).

D

[¶ 36] During the January 5 hearing, Garaas also engaged in the lengthy colloquy with the court in which Garaas repeatedly questioned the court on what basis it was proceeding and accused the court of having ex parte contacts with the Supreme Court. Garaas's conduct can be characterized as disruptive, belligerent, and disrespectful. Rule 3.5(b), N.D.R. Prof. Conduct, provides a lawyer shall not "engage in conduct intended to disrupt a tribunal." Under N.D.C.C. § 27-13-01(1) and N.D.R. Prof. Conduct 8.4(e), a lawyer is also prohibited from engaging in conduct that fails to maintain proper respect for the court. Garaas's conduct was disruptive, belligerent,

and disrespectful to the court and violated N.D.R. Prof. Conduct 3.5(b) and 8.4(e) .

VII

[¶ 37] Civility is not too much to expect in a civilized society's alternative to brute force, stealth, and deception. In the final analysis, we will not allow this lawyer to drag to a new low the baseline of acceptable courtroom conduct. Garaas's conduct went beyond acceptable zealous representation and constituted violations of the disciplinary rules.

[¶ 38] We have determined Garaas violated various disciplinary rules by his conduct at the post-judgment proceedings. The hearing panel ordered that Garaas be publicly reprimanded and that he pay the costs of the disciplinary proceedings. The hearing panel found substantial mitigating factors on Garaas's behalf.

[¶ 39] We have considered the nature of Garaas's conduct, the multiple violations, Garaas's prior disciplinary record, and the substantial mitigating factors. We conclude that under the circumstances of this case, a public reprimand and payment of costs are appropriate sanctions.

[¶ 40] We order that Garaas be publicly reprimanded for violating N.D.R. Prof. Conduct 3.5(a), 3.5(b), and 8.4(e). We further order that Garaas pay the costs of the disciplinary proceedings in the amount of $7,312.42.

[¶ 41]

Gerald W. VandeWalle, C.J.
Dale V. Sandstrom
William A. Neumann

Mary Muehlen Maring
James H. O'Keefe, S.J.

[¶ 42] The Honorable James H. O'Keefe, Surrogate Judge, sitting in place of Kapsner, J., disqualified.

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

IN THE MATTER OF THE APPLICATION FOR DISCIPLINARY ACTION AGAINST JONATHAN T. GARAAS, A MEMBER OF THE BAR OF THE STATE OF NORTH DAKOTA	)))))))	File No. 3479-SE-0101

REPORT OF HEARING PANEL AND ORDER OF REPRIMAND

The above entitled matter came on for hearing on January 8 and 9, 2002, in Fargo, North Dakota before a hearing panel of Dwight F. Kalash, Chair; Ronald F. Fischer and Steven D. Tangen. Respondent Jonathan T. Garaas was present, with his attorney Ronald H. McLean. Also present was Disciplinary Counsel Paul W. Jacobson.

The hearing panel heard the testimony of Frank L. Racek, Joseph A. Turman, Daniel A. Bueide, Sidney J. Spaeth, David T. Demars, Thomas A. Davies, Kathy Quaife, Beverly Bergson, Thomas R. Olson, Mark R. Boening, Jonathan T. Garaas, Gary Annear, James A. Grettum, James Leahy, David A. Garaas, Mark R. Fraase and Respondent. It received exhibits as noted in the transcript. Based upon the pleadings, evidence, and post-hearing written arguments of Disciplinary Counsel and Respondent, the hearing panel makes the following findings, conclusions and recommendations:

FINDINGS

1. Jonathan Garaas was admitted to practice as an attorney and counselor at law in the courts of North Dakota on July 27, 1973, and his name has appeared since that date on the roll of attorneys admitted to the Bar of North Dakota as maintained by the Supreme Court of North Dakota.

2. Garaas represented defendants in a case entitled Matrix Properties Corp., et al. v. TAG Investments, et al., venued in the District Court of Cass County, East Central Judicial District. A Motion to Compel Transfer of Deeds/Property in the matter was held on November 7, 2000, presided over by District Judge Frank L. Racek. The plaintiff was represented at the hearing by attorney Sidney J. Spaeth. During the hearing Garaas said "*Your honor, I cannot let it go by one more time because Mr. Spaeth just lied to you one more time. I have never said I was willing to close. That representation is an absolute falsehood and he can't get away with it anymore. We are willing, to honor the Option to Purchase dated October 14, 1996. We will never accept any deviation from its terms. And we will never accept Mr. Spaeth's false representation in violation of the Canons and in violation of every concept of due process that I know.*"

3. A status conference in the matter was held on January 2, 2001, presided over by District Judge Frank L. Racek. During the hearing Garaas was asked whether his client was going to sign a warranty deed when he was ordered to

do so on the following Friday. Part of Garaas's response was "*There are a lot of things that are going to have to be resolved, and I guess frankly I have a question in my mind as to whether or not the Court wants to enter into a course of action that places the trial court judge and the State of North Dakota at risk.*" Another part of Garaas' response was "*So when you ask me a question as to whether nor not we are going to sign a deed, there are so many things that still have yet to be resolved that why would the Court want to put this Court and the State of North Dakota at risk...*"

4. A "Court Overseen Closing" in the matter was held on January 5, 2001, presided over by District Judge Frank L. Racek. During the hearing, the following colloquy occurred between Garaas and Judge Racek.:

THE COURT:	The Defendant – the Defendant's counsel in the presence of the Court has informed the Court that they'll not comply with the Court's order. Proceed.
MR. GARAAS:	Which Court order are you talking about, Your Honor?
THE COURT:	The order to convey it's property.
MR. GARAAS:	Which one was that, Your Honor?

THE COURT: The one they just made.

MR. GARAAS: At this point in time?

THE COURT: Yes.

MR. GARAAS: On what legal basis, Your Honor?

THE COURT: Enough. Sit. Enough.

MR. GARAAS: On was legal basis? I only ask that this Court identify on what legal basis it acts, because my client has a right to know. My client has a right to due process of law, Your Honor.

THE COURT: Proceed.

MR. GARAAS: You will not answer my question, Your Honor?

THE COURT: Mr. Garaas, I've already put on the record that we're proceeding pursuant to the Supreme Court's directive of December 12th.

MR. GARAAS: And how does the Court get around the fact that it isn't a final Supreme Court order and the mandate has not been returned to you and jurisdiction still is at

the Supreme Court, Your Honor? How can this Court act in derogation of it's duties to honor the fact that jurisdiction is now at the Supreme Court level not back here. This Court can't act, Your Honor, on the basis of the December 12, 19 – of the year 2000 decision of the Supreme Court. How can the Court act when it doesn't have jurisdiction based upon that order, Your Honor? My client would like to know.

THE COURT: The Court's been directed by the Supreme Court to proceed. The Supreme Court directs the District Court what to do. I am proceeding under that directive.

MR. GARAAS: Is there a directive that's different than the December 12, 2000, order, Your Honor? Has there been direct communication between the Supreme Court and this Court that is not of record and not reported on December 12th. Because there is no such

directive other than the December 12th and that's not a final order. Is there a directive from the Supreme Court to this Court to proceed today that is not placed of record, Your Honor? Have you had telephone conversations with any member of the Supreme Court?

THE COURT: Mr. Garaas, of course not. But this is now getting to be ridiculous. You've tried these arguments now in front of eight different judges, five in the Supreme Court, Judge Erickson, this Court, Judge Webb. It's over so we're gonna proceed. Go ahead.

MR. GARAAS: Has there been communications with any representative of the Supreme Court of North Dakota?

THE COURT: Sit down now, Mr. Garaas. Proceed.

MR. GARAAS: May I – my client and I would like to know, Your Honor.

THE COURT: Mr. Garaas, this is the last time now before I ask you to be removed from the Court. We're gonna proceed with the hearing. Your partner will have to sit in your place. But this is beyond any appropriate measure of conduct for an attorney.

MR. GARAAS: I merely wanted to know what jurisdiction the Court was exercising, Your Honor.

THE COURT: Proceed.

5. At the "Court Overseen Closing" in the matter held on January 5, 2001, Garaas told Judge Racek *"On December 21, 2000, we prepared a petition for rehearing from that appeal. The first issue was that the North Dakota Supreme Court has wrongfully identified the issue on appeal." Actually they made a false representation of what the issue was being appealed."* These statements by Mr. Garaas are of record in the trial court proceedings, and are undisputed by the respondent.

6. Garaas has previously been disciplined with a private reprimand by the Inquiry Committee East in 1994, file no. 2308-E-9401.

7. At the time relevant to these proceedings, Garaas was suffering from significant personal problems because of the unfortunate circumstances of

a family member. At the time relevant to these proceedings, Garaas's office had been flooded, causing stress for Garaas.

8. Garaas has an excellent reputation in the community and profession.

CONCLUSIONS

1. The conduct of Jonathan T. Garaas violated the following Rules of Professional conduct:

A. Rule 3.5(a), IMPARTIALITY AND DECORUM OF THE TRIBUNAL, RPC, which provides that a lawyer shall not seek to influence a judge by means prohibited by law, by threatening Judge Racek with some personal consequence to himself, by saying that the Judge was putting himself at risk.

B. Rule 3.5(b), IMPARTIALITY AND DECORUM OF THE TRIBUNAL, RPC, which provides that a lawyer shall not engage in conduct intended to disrupt a tribunal, through saying that the Judge was putting himself at risk; and by his colloquy with District Judge Frank Racek at the January 5, 2001 hearing.

C. Rule 8.4(e), MISCONDUCT, RPC, which provides it is professional misconduct to engage in conduct enumerated in the North Dakota Century Code through violation of § 27-13-01(1), NDCC, maintaining respect for the Court, and §

27-14-02, NDCC, committed any other act that brings reproach upon the legal profession, by saying that the Judge was putting himself at risk; by his colloquy with District Judge Frank L. Racek at the January 5, 2001 hearing.

D. Rule 1.2A(8), NDRLD, engage in conduct prejudicial to the administration of justice by saying that the Judge was putting himself at risk; by his colloquy with District Judge Frank L. Racek at the January 5, 2001 hearing.

2. With respect to Disciplinary Counsel's allegation that Garaas violated Rule 4.4 RESPECT FOR RIGHTS OF THIRD PERSON, RPC, which provides that a lawyer shall not use means that have no substantial purpose other than to embarrass or burden a person, the Panel does not find by clear and convincing evidence that the remarks made to the Court by Mr. Garaas about Mr. Spaeth telling lies to the Court constitutes a breach of Rule 4.4 RPC under the factual context in which the statement was made.

3. While the Panel finds the comments Garaas made that the North Dakota Supreme Court *"made a false representation"* were improper, those comments were not part of the petition for discipline. Therefore, those comments will not be the subject of discipline nor shall they be considered in the deposition of this case.

4. The Panel concludes that the personal (family)

problems Garaas was dealing with, and the stress Garaas faced from the flooding of his office, are significant mitigating factors, and explain (although do not justify) his improper comments to the Court.

5. Disciplinary Counsel has incurred reasonable costs and disbursements in pursuing the petition for discipline in the sum of $7,312.42.

ORDER OF REPRIMAND

In light of the foregoing findings and conclusions it is hereby ORDERED:

1. That the respondent Jonathan T. Garaas be and hereby is PUBLICLY REPRIMANDED, pursuant to Rules 7 and 9.3 of the Standards of Imposing Lawyers Sanctions, for violating Rules 3.5(a), 3.5(b) and 8.4(e) of the North Dakota Rules of Professional Conduct, and Rule 1.2A(8), NDRLD.

2. That the charge by Disciplinary Counsel that Garaas violated Rule 4.4, NDRPC, is hereby DISMISSED with prejudice.

3. That Garaas shall pay the reasonable costs and disbursements of these proceedings in the sum of $7,312.42.

Dated this 18th day of April, 2002.

/s/ Dwight F. Kalash
Dwight F. Kalash, Chair
Hearing Panel

Dated this 19th day of April, 2002.

/s/ Ronald F. Fischer
Ronald F. Fischer, Member
Hearing Panel

Dated this 16th day of April, 2002.

/s/ Steven D. Tangen
Rev. Steven D. Tangen, Member
Hearing Panel

BEFORE THE DISCIPLINARY BOARD
OF THE SUPREME COURT OF THE
STATE OF NORTH DAKOTA

IN THE MATTER OF THE APPLICATION FOR DISCIPLINARY ACTION AGAINST JONATHAN T. GARAAS, A MEMBER OF THE BAR OF THE STATE OF NORTH DAKOTA	File No. 3479-SE-0101 **RESPONSE TO PETITION FOR DISCIPLINE**

Jonathan T. Garaas, for his response to the Petition dated May 4, 2001, states the following:

I.

Respondent Jonathan T. Garaas denies each and every allegation contained in the Petition, except as hereinafter specifically admitted, qualified, or explained.

II.

Respondent Jonathan T. Garaas admits Paragraph I of the Petition.

III.

As to Paragraph II of the Petition, Respondent admits that Jonathan T. Garaas represents the defendants in the case entitled, *Matrix Properties Corp., et al., v. TAG Investments, et al.,* venued in the

District Court of Cass County, East Central Judicial District. Respondent Jonathan T. Garaas admits that a hearing was held on November 7, 2000. As to the remaining allegations in Paragraph II, Respondent Jonathan T. Garaas denies that he violated North Dakota Rules of Professional Conduct 3.5(a), 3.5(b), 4.4, and 8.4(e). Respondent denies that he violated North Dakota Rule of Lawyer Discipline 1.2(A)(8). Respondent denies that he violated N.D.C.C. § 27-14-02(7) or N.D.C.C. § 27-13-01(1).

IV.

As to Paragraph III of the Petition, Respondent admits that a status conference was held on January 2, 2001, with the purpose of the "status conference" not being explained to Respondent prior to the January 2, 2001, hearing. As to the remaining allegations of Paragraph III of the Petition, Respondent Jonathan T. Garaas denies that he violated North Dakota Rules of Professional Conduct 3.5(a), 3.5(b), 4.4, and 8.4(e). Respondent denies that he violated North Dakota Rule of Lawyer Discipline 1.2(A)(8). Respondent denies that he violated N.D.C.C. § 27-14-02(7) or N.D.C.C. § 27-13-01(1).

V.

As to Paragraph IV of the Petition, Respondent admits that a court supervised real estate closing was held on January 5, 2001, presided over by District Judge Frank L. Racek. As to the remaining allegations of Paragraph IV of the Petition, Respondent Jonathan T. Garaas denies that he violated North Dakota Rules of Professional Conduct 3.5(a), 3.5(b), 4.4, and 8.4(e). Respondent denies that he violated North Dakota Rule

of Lawyer Discipline 1.2(A)(8). Respondent denies that he violated N.D.C.C. § 27-14-02(7) or N.D.C.C. § 27-13-01(1).

VI.

As to Paragraph V of the Petition, Respondent Jonathan T. Garaas admits that a court supervised real estate closing was held on January 5, 2001. As to the remaining allegations of the Paragraph V of the Petition, Respondent Jonathan T. Garaas denies that he violated North Dakota Rules of Professional Conduct 3.5(a), 3.5(b), 4.4, and 8.4(e). Respondent denies that he violated North Dakota Rule of Lawyer Discipline 1.2(A)(8). Respondent denies that he violated N.D.C.C. § 27-14-02(7) or N.D.C.C. § 27-13-01(1).

VII.

Respondent Jonathan T. Garaas denies Paragraph VI of the Petition.

VIII.

Respondent Jonathan T. Garaas states that he has an obligation as an attorney to zealously assert his client's position.

IX.

Respondent Jonathan T. Garaas states that it is a lawyer's duty "when necessary to challenge the rectitude of official actions" as set out in the preamble of the Rules of Professional Conduct.

X.

Respondent Jonathan T. Garaas states that he has an obligation to provide competent representation to his client.

XI.

Respondent Jonathan T. Garaas states that he, like any other citizen, has First Amendment rights under the Constitution of the United States and its counterparts in the Constitution of the State of North Dakota and that all communication set forth in the Petition were made in the exercise of Respondent's free speech r ights and cannot for m the basis for any disciplinary action.

XII.

Respondent Jonathan T. Garaas states that all communication set forth in the Petition are absolutely privileged under N.D.C.C. §14-02-05 and cannot form the basis for any disciplinary action.

XIII.

That the Petition fails to state a claim upon which relief can be granted. That all communications set forth in Paragraphs II, III, IV, and V of the Petition are constitutionally protected speech being either (a) a statement made by Respondent with a belief in the statement's truth or (b) are questions made by the Respondent so the Respondent may ascertain the truth. The Petition does not allege that the statements made by Respondent were made in a reckless disregard for the truth, and, therefore, the Petition is

fatally flawed and does not support a disciplinary action. As to the allegations of the Petition concerning questions posed by Respondent to the Court, such questions cannot be a subject of any disciplinary action in that questions are not assertions of fact.

WHEREFORE, Jonathan T. Garaas respectfully requests as follows:

1. That the Petition be dismissed with prejudice.

2. That he be awarded his costs in this action.

Dated this 29th day of June, 2001.

BY: /s/ Ronald H. McLean

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BEFORE THE DISCIPLINARY BOARD OF THE

SUPREME COURT OF THE STATE OF

NORTH DAKOTA

IN THE MATTER OF THE APPLICATION FOR DISCIPLINARY ACTION AGAINST JONATHAN T. GARAAS, A MEMBER OF THE BAR OF THE STATE OF NORTH DAKOTA	File No. 3479-SE-0101 PRE-HEARING BRIEF OF JONATHAN T. GARAAS

* * *

B. Jonathan's Statements Are Protected by the First Amendment

Disciplinary Counsel seeks the imposition of discipline based not on any improper conduct by Jonathan, but based solely on Jonathan's statements and arguments. These alleged violations therefore implicate Jonathan's right to free speech under the First Amendment and under the Constitution of North Dakota. As such, whether the above cited rules and statutes prohibit Jonathan's statements must take into consideration the limits the First Amendment and the State Constitution place on those rules in order to preserve the right to free speech.

Although a lawyer's First Amendment rights are limited when he/she is in court, lawyers do not check their free speech rights at the courtroom door. Gentile

v. State Bar of Nevada, 501 U.S. 1030, 1071 (1991). An attorney retains his right to free speech while in the courtroom, so long as the attorney is not disruptive. This must be the standard under which the disciplinary rules and statutes are interpreted and applied.

In considering what constitutes protected speech versus "disruptive" speech, the U.S. Supreme Court has found that "statements uttered in a boisterous tone," but that did not actually disrupt the proceeding" were not proper grounds for contempt. In re Little, 92 S.Ct. 659, 660 (1972). The Court noted: "Judges are supposed to men of fortitude, able to thrive in a hardy climate. Trial courts must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." Id. Courts have imposed discipline for a wide range of "offensive and threatening speech," but heated and vigorous argument is not grounds for discipline and is still protected by the First Amendment. See, e.g., Standing Comm. on Discipl. v. Ross, 735 F.2d 1168, 1171 (9th Cir. 1984) (telling opposing counsel "if you get in my way, I'm going to punch you right in the f—ing face").

Additionally, it is well-established that statements made in judicial proceedings are protected by an absolute privilege. In the Matter of Dvorak, 611 N.W.2d 147 (N.D. 2000) and N.D.C.C. § 14-75-05(2). Although this privilege generally arises in the context of defamation claims, the underlying public policy behind the privilege, that persons should be free to speak openly in court, applies in the instant disciplinary matter as well. Attorneys should be free

to vigorously argue their client's position without fear of being disciplined.

It is in this light that the above disciplinary rules must be interpreted. Jonathan's statements and argument, although heated and persistent, do not rise to the level necessary to lose his First Amendment rights and he should not be subject to discipline. To find that they do would contradict a lawyer's right to vigorously argue his/her clients position as long as it does not disrupt the proceeding. Jonathan vigorously set forth his client's position and sought to establish a clear basis for an appeal, but did not disrupt the proceedings. Therefore, he should not be subject to discipline.

* * *

BEFORE THE DISCIPLINARY BOARD OF THE

SUPREME COURT OF THE STATE OF

NORTH DAKOTA

IN THE MATTER OF THE APPLICATION FOR DISCIPLINARY ACTION AGAINST JONATHAN T. GARAAS, A MEMBER OF THE BAR OF THE STATE OF NORTH DAKOTA	File No. 3479-SE-0101 POST-HEARING BRIEF OF JONATHAN T. GARAAS

* * *

B. Jonathan's Statements Are Protected by the First Amendment

In addition to the clear and convincing burden of proof set forth in Rule 3.5(C), the overriding protections of the First Amendment must also be considered in this matter. Disciplinary Counsel has an additional burden of proving the statements are not protected speech by clear and convincing evidence. Because Disciplinary Counsel seeks the imposition of discipline based not on any improper conduct by Jonathan, but based solely on his statements, Jonathan's right to free speech under the First Amendment and the North Dakota Constitution is implicated. As such, the Rules of Professional Conduct at issue in this disciplinary action must be

interpreted and applied within the limits of the First Amendment.

Although a lawyer's First Amendment rights are limited when he/she is in court, lawyers do not check their free speech rights at the courtroom door. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1071 (1991). "Thus, we begin with the accepted legal principle that if an attorney's activity or speech is protected by the First Amendment, disciplinary rules governing the legal profession cannot punish the attorney's conduct." In re Green, 11 P.3d 1078, 1083 (Colo. 2000) (en banc). An attorney retains his right to free speech while in the courtroom, so long as that speech does not become so disruptive that it no longer is considered protected speech, but rather becomes unprotected conduct. Id. With respect to statements regarding a judge, a public figure, "[b]ecause attorney discipline is quasi-criminal in nature and the [U.S. Supreme] Court has applied the New York Times [actual malice] test to criminal defamation, several other jurisdictions apply the New York Times test or a minor modification of this test in disciplining attorneys who criticize judges." Id. (citing Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1437-38 (9th Cir. 1995); U.S. District Court v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993); In re Graham, 453 N.W.2d 313, 320-21 (Minn. 1990); State Bar v. Semaan, 508 S.W.2d 429, 432-33 (Tex.App. 1974). The New York Times "actual malice" test requires that the statement be made "with knowledge that it was false or with reckless disregard of whether it was false or not." Id. There is no evidence, or even an allegation, that any of the statements by Jonathan wer e false or m ade with reckless disregard to the truth. Therefore, all the

alleged statements are protected by the First Amendment.

In considering what constitutes protected speech versus "disruptive" conduct, the U.S. Supreme Court has found that "statements uttered in a boisterous tone," but that did not actually disrupt the proceeding" were not proper grounds for contempt. In re Little, 92 S.Ct. 659, 660 (1972). The Court noted: "Judges are supposed to be men of fortitude, able to thrive in a hardy climate. Trial courts...must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." Id. Courts have imposed discipline for a wide range of "offensive and threatening speech," see, e.g., Standing Comm. on Discipl. v. Ross, 735 F.2d 1168, 1171 (9th Cir. 1984) (telling opposing counsel "if you get in my way, I'm going to punch you right in the f—ing face"), but heated and vigorous argument is not grounds for discipline and is still protected by the First Amendment.

Additionally, it is well-established that statements made in judicial proceedings are protected by an absolute privilege. N.D.Const., Art. I, sec. 5; N.D.C.C. § 14-75-05(2); In the Matter of Dvorak, 2000 ND 98, 611 N.W.2d 147. Although this privilege generally arises in the context of defamation claims, the underlying public policy behind the privilege, that persons should be free to speak openly in court, applies in the instant disciplinary matter as well. Attorneys should be free to vigorously argue their client's position without fear of being disciplined.

It is in this light that the above disciplinary rules must be interpreted and applied. Jonathan's

statements, although vigorous and persistent, and to some impolite, were not false or made with reckless disregard to their truth or falsity, nor did they disrupt any of the proceedings. Thus, these statements are protected under the First Amendment and Jonathan should not be subject to discipline. To find that they do would violate a lawyer's right to vigorously argue his/her clients position as long as the lawyer's statements do not recklessly disregard the truth or disrupt the proceeding.

There is no evidence that Jonathan's statements were in reckless disregard of the truth or disruptive, and in fact, it was not even alleged in the Petition for Discipline that the statements were false or made recklessly. Therefore, all communications set forth in Paragraphs II, III, IV, and V of the Petition are constitutionally protected speech [Federal and State Constitution] being either (a) a statement made by Jonathan with a belief in the statement's truth or (b) are questions made by Jonathan so that Jonathan may ascertain the truth. In addition, in a judicial setting, every statement is absolutely privileged – a well-known legal principle.[1] Because the Petition for

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1

"..Under N.D.C.C. § 14-02-05(2), a communication is privileged when it is made '[i]n any legislative or judicial proceeding or in any other proceeding authorized by law.' Such a statement is protected by absolute privilege; thus, even if the statement was made with actual malice, the speaker is protected from liability. Rykowsky v. Dickinson Pub. Sch. Dist. No. 1, 508 N.W.2d 348, 351 (N.D. 1993).

...

If 'all persons are presumed to know the law,' Toolley

Discipline fails to allege Jonathan's statements were false or made with reckless disregard for the truth, they are protected and the Petition should be dismissed pursuant to N.D.R.Civ.P. 12(b) for failure to state a claim upon which relief can be granted and N.D.R. Lawyer Discipl. 3.5(C) for failure to establish by clear and convincing evidence that violations had occurred.

* * *

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v. Alm, 515 N.W.2d 137,141 (N.D. 1994), then certainly Dvorak, as a seasoned attorney, knew or should have known of the legal principles explained above." Disciplinary Action Against Dvorak, 2000 ND 98 ¶s 10, 12, 611 N.W.2d 147.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

IN THE MATTER OF THE APPLICATION FOR DISCIPLINARY ACTION AGAINST JONATHAN T. GARAAS, A MEMBER OF THE BAR OF THE STATE OF NORTH DAKOTA	Disciplinary Board No. 3479-SE-0101

PETITION FOR REVIEW OF REPORT AND ORDER OF HEARING PANEL AND OBJECTIONS TO REPORT OF HEARING PANEL

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PETITION FOR REVIEW OF

HEARING PANEL'S ORDER

and

OBJECTION TO HEARING PANEL'S REPORT

Pursuant to Rule 3.1 F(1) of the North Dakota Rules for Lawyer Discipline, lawyer Jonathan T. Garaas, and his attorney, Ronald H. McLean of the Serkland Law Firm of Fargo, North Dakota, petition this Court for review of the Hearing Panel's order contained in its Report of Hearing Panel and Order of Reprimand, filed with the Secretary of the Disciplinary Board on April 22, 2002. Pursuant to Rule 3.1 F(2) lawyer, Jonathan T. Garaas, and his counsel, Ronald H. McLean object to the report in that the report fails to properly address the free speech rights of Jonathan T. Garaas as an attorney representing a client before a court of law.

The objections to the report are intertwined with the Petition for Review and, therefore, the two are combined in this document.

The grounds for the Petition for Review are that the decision of the Hearing Panel [and its application of professional rules or statutes] arbitrarily, capriciously and unr easonably infr inges upon the right of free speech of Jonathan T. Garaas guaranteed under the Free Speech Clause of the First Amendment to the Constitution of the United States of America, applicable to the states under the Fourteenth Amendment to the Constitution of the United States of

America, and guaranteed under Article 1, § 4 of the Constitution of North Dakota.

THRESHOLD DETERMINATION REQUIRED

With regard to this Petition for Review and Objection to the Report, the Court must "'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" See, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1038 (1991) quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) which case quotes *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286 (1964). In fulfilling this duty, this Court must (1) examine the statements in issue; (2) examine the circumstances under which they were made; (3) under the circumstances of the case, make an assessment whether or not the speech carries a clear and present danger [assessment of proximity and degree of harm] to the administration of justice [impartiality and good order of the courts]; and (4) whether or not the questioned speech is protected speech under the principles of the First Amendment. See, *Gentile v. State Bar of Nevada, supra.*, at pages 1037, 1038 and 1039.

The Hearing Panel failed to make the appropriate assessment of whether the speech in question was pr otected speech. As a result, the Hearing Panel arbitrarily, capriciously and unreasonably authorized a reprimand of Jonathan T. Garaas for speech, in a courtroom, that the First Amendment was designed to protect. The free discussion of governmental affairs is the major

purpose of the First Amendment. See, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978); *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Both the Courts, as an institution, or judges, as individuals, do not have immunity from criticism. *Bridges v. California*, 314 U.S. 252, 289 (1941). Injury to the reputation of the courts, as an institution, or the judge, as an individual, are insufficient to repress free speech. *Landmark Communications, Inc. v. Virginia, supra.*, at page 841. Because the Hearing Panel failed in its duty to assess the free speech implications of this case; the arbitrariness, capriciousness, unreasonableness of its findings, and the reasons that the findings are objectionable include the following:

1. No Violation of Any Known Statute or Rule Prohibits Speech.

The sanctioned statements of Jonathan T. Garaas, do not, by the words uttered, constitute a violation of any known statute or rule. Yet the words alone, as the Findings and Conclusions of the Hearing Panel indicate, are the sole reason that the Panel identifies a violation of Rule 3.5(a) of the North Dakota Rules of Professional Conduct. The Hearing Panel acted arbitrarily, capriciously and unreasonably in not identifying the statute or rule that prohibits the words chosen by Jonathan T. Garaas on January 2, 2001. The Hearing Panel acted arbitrarily, capriciously and unreasonably in not identifying [or even requiring Disciplinary Counsel to identify] the statute or rule that prohibits the words chosen by Jonathan T. Garaas on January 2, 2001. Without the identification of the statute or rule that prohibits the chosen words,

Jonathan T. Garaas is denied fair notice of the charges against him, denied a fair examination of the facts in relationship to the elements of the statute or rule, and suffers a discriminatory enforcement of the disciplinary rules. Even if a statute or rule had been identified by Disciplinary Counsel or the Hearing Panel, since the speech of Jonathan T. Garaas is the method identified as violating the statute or rule [or the claimed target of the unidentified statute or rule], such statute or law forbidding the speech would need to be balanced with the right of free speech. Without fair notice as to the statute or rule that prohibits the speech, it is impossible to conduct a reasonable and non-discriminatory assessment whether there is a clear and present danger of the harm said to flow from the utterance.

The utterances of Jonathan T. Garaas, made during a court status conference, informs the court of status of the case as Jonathan T. Garaas perceived it to be on January 2, 2001. The questioned discourse involved an utterance as to what must be determined by Jonathan T. Garaas in "his mind" before he could advise his clients to execute a deed. When the lengthy answer of Jonathan T. Garaas to Judge Racek's question is viewed as a whole [rather than through selective editing] one sees only legal advocacy and the statement of a legal opinion by an attorney on behalf of his client: i.e., the judge may be acting without jurisdiction and faced the risks that are apparent when a court acts without jurisdiction. A statement of an opinion is always protected by the First Amendment, unless it implies a false statement of fact. In re Green, 11 P.3rd 1078, 1084 (Colo. 2000). The "at risk" statements are merely "rhetorical

hyperbole" and are not sanctionable. See, Standing Committee on Disp. v. Yagman, 55 F.3d 1430, 1438 (9th Cir. 1995).

The Hearing Panel capriciously characterizes the utterances of Jonathan T. Garaas as a "threat" however it is not a threat under the common law of North Dakota. See State v. Howe, 247 N.W.2d 647, 654 (N.D. 1976). And without an identified statute or law that prohibits the utterance, or proclaims the utterance as a "threat," Jonathan T. Garaas is unreasonably denied not only his free speech rights, but his right to fair notice and a fair hearing.

There is no evidence of any unlawful action or means prohibited by law.

2. No Conduct Intended to Disrupt a Tribunal.

The Hearing Panel arbitrarily, capriciously and unreasonably determined that Jonathan T. Garaas engaged in conduct intended to disrupt a tribunal prohibited under 3.5(b) of the North Dakota Rules of Professional Conduct. The only identified conduct is speech of Jonathan T. Garaas during the status conference of January 2, 2001, and the Court Overseen Closing of January 5, 2001. The Hearing Panel's conclusion was issued without the appropriate assessment of whether the utterances of January 2, 2001, and colloquy of January 5, 2001, are protected speech. The Hearing Panel's conclusion was issued without mandated factual findings that the utterances, or colloquy, constitute a clear and present danger to the disruption of a tribunal. See, *Gentile v. State Bar*

of Nevada, supra., at page 1037; *Landmark Communications, Inc. v. Virginia, supra.*, pages 844 and 855.

The Disciplinary Counsel and the Hearing Panel do not explain, in any sense, how the utterances of Garaas, on January 2, 2001, were intended to disrupt the tribunal. The Disciplinary Counsel's Complaint did not allege the January 2, 2001, status conference was in way hampered by the utterance of Jonathan T. Garaas. In said utterance Garaas explained, to the Court, his opinion of the status of his relationship to his client and whether he could recommend his client could sign a deed (in other words, the status of the case in the opinion of Garaas on January 2, 2001). When the proceeding of January 2, 2001, is viewed as a "whole,"one sees that the work of the Court was accomplished on that date – with the substantial assistance of Jonathan T. Garaas. The Disciplinary Counsel did not introduce any evidence that the court was interrupted by the utterance of Jonathan T. Garaas on January 2, 2001, in any way. Thus, there is no factual basis alleged or proven by the Disciplinary Counsel and no factual basis determined by the Hearing Panel that would sustain its conclusion that the January 2, 2001, utterance intended to disrupt or resulted in the disruption of the Court's business on January 2, 2001. As it relates to the January 2, 2001, utterance, the pleadings, proof, and factual findings cannot sustain the Hearing Panel's conclusion and the Hearing Panel did not make a proper assessment of the free speech rights of Garaas as to said utterances.

Similarly, the Disciplinary Counsel and the Hearing Panel do not explain how the colloquy on January 5, 2001, was intended to disrupt, or actually disrupted, the Court Overseen Closing. The Disciplinary Counsel did not present any evidence, and the Hearing Panel did not find any fact that the Court Overseen Closing was intended to be disrupted or was disrupted by the colloquy of January 5, 2001. When viewed as a "whole," one finds that claimed violation of January 5, 2001, stems from repeated questions of Jonathan T. Garaas asking Judge Racek to explain his jurisdictional basis for ordering the transfer of property. There was no evidence submitted that the colloquy disrupted the proceedings or was intended to disrupt the proceedings. Viewed as a whole, Jonathan T. Garaas is trying to ascertain if Judge Racek had information that his pending Petition for Rehearing had been rejected by the Supreme Court of North Dakota, and if not, trying to make a record for appeal. Thus, there is no factual basis proven by the Disciplinary Counsel and no factual basis determined by the Hearing Panel that would sustain its conclusion that the January 5, 2001, colloquy intended to disrupt or resulted in the disruption of the Court's business of January 5, 2001. As it relates to the January 5, 2001, colloquy the pleadings, proof and factual findings cannot sustain the Hearing Panel's conclusion and the Hearing Panel did not make a proper assessment of the free speech rights of Gāraas as to said colloquy.

It is important to note that Judge Racek did not view the courtroom conduct of Jonathan T. Garaas to be contemptuous and recognized the court's business was accomplished. Transcript, page 56. In many

jurisdictions, in order for a statement to violate Rule 3.5(b), the statement must meet the standards for criminal contempt. See Annot. Model Rules of Professional Conduct at pages 343-344 (3rd ed. 1996). If his courtroom conduct was not contemptuous and the court's business was accomplished, it cannot be said that there was a clear and present danger that a tribunal was disrupted by the speech of Garaas.

3. No Lack of Respect For, or Reproach Upon, The Legal Profession.

The Hearing Panel arbitrarily, capriciously and unreasonably concluded that Jonathan T. Gar aas failed to maintain respect for the courts or brought reproach upon the legal profession in violation of N.D.R. Prof. Conduct Rule 8.4(e) and N.D.C.C. §§ 27-13-01(1) and 27-14-02 based upon speech alone. Since the only identified conduct is speech, the Hearing Panel failed in its duty to assess whether the utterances were protected speech. The Hearing Panel arbitrarily, capriciously, and unreasonably issued its conclusion without the requisite finding of fact that speech of Jonathan T. Garaas presented a clear and present danger to the reputation of the legal profession or respect for the court system. There was no evidence presented, and no factual determination made by the Hearing Panel, that the post-judgment proceedings of the legal profession was injured or the reputation of the courts were injured by the utterances of Jonathan T. Garaas. These factual findings are necessary before speech can be punished. See, *Landmark Communications, Inc. v. Virginia, supra.*, pages 844 and 845. The questioned speech, made by Garaas, was made in post-judgment adversarial proceedings

claiming to enforce the judgment. The speech was made in a court room and to a limited audience. Under these circumstances and context, First Amendment scrutiny must be made under a backdrop that there is a lesser governmental interest involved than would be involved in a public speech that may affect a fair trial. In re Green, *supra.*, at page 1087. Under the circumstances the statements were made, it cannot be said that (1) there is substantial governmental interest in suppressing the free speech rights of Garaas and (2) that there is a substantial and imminent threat to the administration of justice. Without such factual showing, Garaas should not be punished for his speech.

4. No Conduct Prejudicial to Administration of Justice.

The Hearing Panel arbitrarily, capriciously and unreasonably concluded that Jonathan T. Garaas was "engaging in conduct prejudicial to the administration of justice" in violation of N.D.R. Lawyer Discipl. Rule 1.2A(8) based upon speech alone. Since the only identified conduct is speech, the Hearing Panel failed in its duty to assess whether the utterances were protected speech. The Hearing Panel arbitrarily, capriciously, and unreasonably issued its conclusion without the requisite finding of fact that speech of Jonathan T. Garaas presented a clear and present danger to the administration of justice. There was no evidence presented, and no factual determination made by the Hearing Panel, that the post-judgment proceedings were disrupted in any way or that the administration of justice was obstructed by the utterances of Jonathan T. Garaas. These factual

findings are necessary before speech can be punished. See, *Landmark Communications, Inc. v. Virginia*, *supra.*, pages 844 and 845. The questioned speech, made by Garaas, was made in post-judgment adversarial proceedings claiming to enforce the judgment. Judge Racek did not recuse himself on January 2, 2001, or January 5, 2001, nor was there a finding that he was under any obligation to do so by the statements of Garaas. Under these circumstances and context, First Amendment scrutiny must be made under a backdrop that there is a lesser governmental interest involved than would be involved in a public speech that may affect a fair trial. In re Green, *supra.*, at page 1087. Under the circumstances the statements were made, it cannot be said that (1) there is substantial governmental interest in suppressing the free speech rights of Garaas and (2) that there is a substantial and imminent threat to the administration of justice. Without such factual showing, Garaas should not be punished for his speech.

5. Lack of Notice of Sanctionable Statements.

N.D.R. Prof. Conduct Rules 3.5(a) and (b), 8.4(e), N.D.C.C. §§ 27-13-01(1) and 27-14-02 and N.D.R. Lawyer Disp. 1.2A(8) did not give adequate notice to Garaas that his questioned statements are sanctionable. The Hearing Panel's decision implies that said rules and statutes suppress the content of protected speech rather than the mere time, place and manner of speaking. No factual findings were made except as to the content of the speech. There are no factual findings made as to the manner of the speech. It is submitted that there is absolutely no notice

provided within the pertinent rules of statutes that would lead one to believe he could be sanctioned for mere speech unless such speech was found to be either (1) knowingly untrue, (2) recklessly made in disregard to its truth, (3) criminal in nature, (3) or disruptive in nature. There is no guidance within the rules, or statutes, that questions posed to a judge concerning his jurisdictional basis, or even the observance of a legal opinion that a judge may be placed "at risk" if he acts without jurisdiction, are banned under said rules. Basing a sanction against an attorney solely upon the content of the attorney's speech leads to the discriminatory enforcement of the disciplinary rules. The rules and statutes claimed to be violated restrict "conduct," not the content of speech. The rules, as applied by the Hearing Panel, do not establish a principle for a lawyer to determine when his speech passes from a safe harbor to the forbidden sea. *Gentile v. State Bar Board of Nevada, supra.*, at page 1049.

Disciplining Garaas for his statements made in post-judgment proceedings diminishes an attorney's constitutional right to voice his opinion and the statutory right to an absolute privilege. See, Article I, §4 of the Constitution of North Dakota. See also, N.D.C.C. § 14-02-05.

Garaas objects to the notice provided to him in these matters. Not only are the rules and statutes, that are claimed to be violated, vague and overly broad, the Petition for Discipline failed to state a cause of action against Garaas.

6. Failure to Sustain Pleading and Proof Requirements.

The Hearing Panel acted arbitrarily, capriciously and unreasonably when it found that Garaas violated the North Dakota Rules of Professional Conduct, statutes relating to legal profession, and the North Dakota Rules For Lawyer Discipline, without requiring Disciplinary Counsel to plead and then prove by clear and convincing evidence all essential elements of the claimed rule or statute violated. Even if this Court determines that the questioned speech is not protected speech, evidence that the speech was intended to disrupt a tribunal was necessary. Evidence was necessary that the reputation of the legal profession was harmed. The words, themselves, do not satisfy this element. Evidence was further necessary that there was prejudice to the administration of justice. The words, themselves, are not sufficient to satisfy these elements. Further, after identifying the rule of law that prohibits the utterances of Garaas, Disciplinary Counsel should have been required to present clear and convincing evidence of all elements of the law that prohibits the speech of Garaas. In other words, the Hearing Panel arbitrarily, capriciously, and unreasonably lessened the proof required of the Disciplinary Counsel by determining that the speech alone constitutes a violation of the pertinent rule or statute. Garaas objects to the procedure used and the lessened burden of proof afforded to the Disciplinary Counsel.

7. Failure to Make Mandatory Factual Findings After a Failure of Predicate Pleadings and Proof.

The Hearing Panel acted arbitrarily, capriciously and unreasonably when it authorized a reprimand of Jonathan T. Garaas without making sufficient factual findings of actual injury or potential injury caused by the questioned statements. See, N.D. Stds. Imposing Lawyer Sanctions 3.0 (c). The Hearing Panel acted arbitrarily, capriciously and unreasonably in not requiring Disciplinary Counsel to first plead and then submit factual evidence of the clear and present danger to the administration of justice, the disruption of a tribunal, or the injury to the reputation of the legal profession or court system by the questioned speech. Imposing a reprimand without appropriate pleadings, evidence, or without appropriate findings of fact stemming from the evidence, leads to the discriminatory enforcement of the North Dakota Standards for Imposing Lawyer Sanctions. Garaas objects to the procedure used and the lessened burden of proof afforded to the Disciplinary Counsel.

RELIEF REQUESTED

WHEREFORE, the Court should review the Report of the Hearing Panel and Order of Reprimand, should set forth a briefing schedule for issues presented herein, and subject this proceeding to First Amendment scrutiny. Garaas does note that for his objections, stated herein, he has fifty days to file a brief.

Respectfully submitted this 10th day of May, 2002.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

IN THE MATTER OF THE APPLICATION FOR DISCIPLINARY ACTION AGAINST JONATHAN T. GARAAS, A MEMBER OF THE BAR OF THE STATE OF NORTH DAKOTA	Supreme Court No. 20020103 20020113

BRIEF OF RESPONDENT

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* * *

B. Garaas' Statements Are Protected by the First Amendment

1. Inadequate evidence and factual findings as to Garaas' free speech.

In addition to the clear and convincing burden of proof set forth in Rule 3.5(c), the overriding protections of the First Amendment to the Constitution of the United States of America must also be considered in this matter. Disciplinary Counsel has an additional burden of proving the statements are not protected speech by clear and convincing evidence. Because Disciplinary Counsel seeks the imposition of discipline based not on any improper conduct by Garaas, but based solely on his statements, Garaas' right to free speech under the First Amendment and the North Dakota Constitution is implicated. As such, the Rules of Professional Conduct at issue in this disciplinary action must be interpreted and applied within the limits of the First Amendment and even broader North Dakota protection.

Although a lawyer's First Amendment rights maybe limited so as to not affect a party's right to a fair trial, lawyers do not check their free speech rights at the courtroom door. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1071 (1991). "Thus, we begin with the accepted legal principle that if an attorney's activity or

speech is protected by the First Amendment, disciplinary rules governing the legal profession cannot punish the attorney's conduct." In re Green, 11 P.3d 1078, 1083 (Colo. 2000) (en banc).

In Gentile, the U.S. Supreme Court determined that although "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press," i.e. a "'clear and present danger' of 'actual prejudice or imminent threat,'" regulation of lawyers' speech must nonetheless be narrowly tailored to further the state's interest in fair trials and the orderly administration of justice. 501 U.S. at 1069, 1071-76. In that case, the U.S. Supreme Court found that the "substantial likelihood of material prejudice" standard for disciplining attorneys contained in the Nevada Supreme Court Rules and other states' ethical rules, is permissible under the First Amendment. Id. at 1075. Thus, under Gentile, an attorney may not be disciplined based solely on his/her speech unless such speech becomes so extreme as to become prejudicial to the administration of justice. This is the overriding standard that must be considered determining whether Garaas' statements may be disciplined. In sum, an attorney retains his right to free speech while in the courtroom, so long as that speech does not become so disruptive that it no longer is considered protected speech, but rather becomes unprotected conduct. Id.

In considering what constitutes protected speech versus "prejudicial" conduct, the U.S. Supreme Court has found that "statements uttered in a boisterous tone," but that did not actually disrupt the

proceeding" were not proper grounds for contempt. In re Little, 404 U.S. 553, 555, 92 S.Ct. 659, 660 (1972). The Court noted: "Judges are supposed to be men of fortitude, able to thrive in a hardy climate. Trial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." Id. Courts have imposed discipline for a wide range of speech that is clearly disruptive and prejudicial to the administration of justice, see, e.g., Standing Comm. on Discipl. v. Ross, 735 F.2d 1168, 1171 (9th Cir. 1984) (telling opposing counsel "if you get in my way, I'm going to punch you right in the f---ing face"), but heated and vigorous argument is not grounds for discipline and is still protected by the First Amendment. As the U.S. Supreme Court stated in Sacher v. U.S., "we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever." 343 U.S. 1, 13 (1952).

Restrictions that incidentally affect a person's right to free speech under the North Dakota Constitution are valid only if the following requirements are met:

1. The regulation is within the constitutional power of the state;
2. It furthers an important or substantial government interest;
3. The governmental interest is unrelated to the suppression of free expression;

4. The incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.

State v. Niska, 380 N.W.2d 646, 649 (N.D. 1986).

Although it is not disputed that the Rules of Professional Conduct satisfy elements one, two and three, the Rules must be narrowly applied when the alleged violation is based solely on speech in order to meet the fourth requirement. As with free speech under the U.S. Constitution, attorneys' may only be subject to discipline for their speech only if such speech is so disruptive as to be prejudicial to the administration of justice. That is the governmental interest that the Rules of Professional Conduct at issue in this matter are intended to protect. Thus, since Gar aas' speech did not r ise to the level of disrupting any of the proceedings, interpreting the Rules of Professional Conduct to allow Garaas' to be disciplined would violate the fourth requirement state above, as the restriction on Garaas' speech would be broader then necessary. See id.

Additionally, it is weli-established that statements made in judicial proceedings are protected by an absolute privilege. N.D.C.C. § 14-02-05(2); In re Dvorak, 2000 ND 98, 611 N.W.2d 147. Although this privilege generally arises in defense of defamation claims, the underlying public policy behind the privilege, that persons should be free to speak openly in court, applies in the instant disciplinary matter as

well. Attorneys should be free to vigorously argue their client's position without fear of being disciplined.

It is in this light that the above disciplinary rules must be interpreted and applied. Garaas' statements, although vigorous and persistent, and to some impolite, were not made with any intent to, nor did they, disrupt or prejudice any of the proceedings. Garaas' only intent and purpose was to vigorously protect his client's interests and to make a sufficient record for an appeal. Thus, these statements are protected under the First Amendment and Garaas should not be subject to discipline.

With respect to statements regarding a judge, a public figure, "[b]ecause attorney discipline is quasi-criminal in nature and the [U.S. Supreme] Court has applied the New York Times [actual malice] test to criminal defamation, several other jurisdictions apply the New York Times test or a minor modification of this test in disciplining attorneys who criticize judges." Id. (citing Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1437-38 (9th Cir. 1995); U.S. District Court v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993); In re Graham, 453 N.W.2d 313, 320-21 (Minn. 1990); State Bar v. Semaan, 508 S.W.2d 429, 432-33 (Tex.App. 1974). The New York Times "actual malice" test requires that the statement be made "with knowledge that it was false or with reckless disregard of whether it was false or not." Id. There is no evidence, or even an allegation, that any of the statements by Garaas were false or made with reckless disregard to the truth. Therefore, all the alleged statements are protected by the First Amendment. It is also to be remembered that the American freedom to

challenge and criticize government is one of the principal characteristics by which we distinguish a free nation from a police state. City of Houston v. Hill, 482 U.S. 451, 462-63 (1987).

Disciplinary Counsel pr esented no evidence that any of Garaas' statements were in reckless disregard of the truth or disruptive. In fact, it was not even alleged in the Petition for Discipline that any of Garaas' statements were false, made recklessly or disruptively. The Hearing Panel did not make any factual finding that any statement, made by Garaas, was false, made recklessly or was disruptive. Therefore, all communications found by the Hearing Panel [as set forth in Paragraphs II, III, IV, and V of the Petition] are constitutionally protected speech [Federal and State Constitution] being either (a) a statement made by Garaas with a belief in the statement's truth or (b) are questions made by Garaas so that Garaas may ascertain the truth. In addition, in a judicial setting, every statement is absolutely privileged -- a well-known legal principle. Because the Petition for Discipline fails to allege Garaas' statements were false or made with reckless disregard for the truth, they are protected, the Petition should have be dismissed pursuant to N.D.R.Civ.P. 12(b) for its failure to state a claim upon which relief can be granted and N.D.R. Lawyer Discipl. 3.5) for failure to establish by clear and convincing evidence that violations had occurred.

2. The Hearing Panel failed to properly assess Garaas' right to free speech.

The Hearing Panel made no findings of fact concerning the context and circumstances of the

statements, made by Garaas, that were concluded by the Panel to be sanctionable. In that the sanctionable conduct found by the Panel consists solely of speech, the Panel failed in its duty to "'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Gentile v. State Bar of Nevada, *supra.*, at 1038. Such an assessment would have included a determination of whether or not the speech carries any kind of clear and present danger [assessment of proximity and degree of harm] to the administration of justice [impartiality and good order of the courts]. In this case, Disciplinary Counsel introduced no evidence that the post-judgment speech of Garaas caused harm in any way to the administration of justice or legal profession. All evidence submitted established that the business of the court was accomplished on November 7, 2000, January 2, 2001 and January 5, 2001.

Because there was no evidence submitted of improper conduct on the part of Garaas [but only speech], the Hearing Panel did not make, nor could they make, the mandated factual findings that the utterances of Garaas constituted a clear and present disruption of a tribunal or brought reproach upon the profession. See Gentile v. State Bar of Nevada, *supra.*, at page 1037; Landmark Communications, Inc. v. Virginia, 435 U.S.829, 844,855 (1978). Because the Hearing Panel failed to make the proper First Amendment assessment, it allowed a sanction for constitutionally protected speech. The methodology used by the Hearing Panel lessened the burden of proof required of Disciplinary Counsel and improperly

sanctioned constitutionally protected speech. Disciplinary Counsel was relieved of his duty to present clear and convincing evidence that a tribunal was disrupted by the speech or that the legal profession suffered reproach.

3. As interpreted by the Hearing Panel, the rules and statutes are overly broad and violate Garaas' free speech rights.

Garaas respectfully submits that the pertinent rules and statutes, claimed to be violated by Garaas, are too overly broad to be able to restrict the free speech rights of lawyers guaranteed to them by the First and Fourteenth Amendment to the Constitution of the United States of America. The Hearing Panel, faced with speech alone as the claimed sanctionable misconduct, found rule violations. "The First Amendment generally prohibits the government from proscribing speech based on disapproval of its content." Svedberg v. Stamness, 525 N.W.2d 678, 682 (N.D. 1994); R.A.V. v St. Paul, 505 U.S.377 (1992). This improper limitation on speech or "... disability is inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case. By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." Legal Services Corporation v. Velazquez, 531 U.S. ____ (2001) slip opinion, page 11. Overbroad statutes and rules infringe upon the right to free speech. When there is

not a clear line between what is protected and forbidden, speakers tend to "'steer far wider of the unlawful zone ....than if the boundaries of the forbidden areas were clearly marked.'" State of South Dakota v. Springer-Ertl, 2000 SD 56, 610 N.W.2d 768, at ¶ 24 quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982).

The subject statutes and rules, claimed to be violated by Garaas, are not narrowly drawn. If interpreted to allow the sanction for speech alone, it allows for the discriminatory and arbitrary sanctioning of attorneys based upon whether the Hearing Panel is comfortable with the message. Both the attorney's right to free speech is impaired as well as his client's right to free speech.

4. November 7, 2000 - Garaas did not intend to embarrass or degrade opposing counsel.

The Hearing Panel correctly determined the statements made by Garaas at the November 7, 2000 hearing did not violate Rule 4.4 N.D.Prof.Cond under the factual context that they were made. Disciplinary Counsel alleged that Garaas had "no substantial purpose other than to embarrass" Sid Spaeth when Garaas accused Spaeth of misrepresenting the facts to the court.

Merely calling opposing counsel's statement a "lie" does not violate Rule 4.4. The cases considering Rule 4.4 establish that much more derogatory conduct

or statements are necessary to violate the Rule. See Disciplinary Board v. Dvorak, 2000 ND 98, ¶ 16 (telling witness' employer that witness had lied); Johnson v. Johnson, 544 N.W.2d 519, 522 (N.D. 1996) (suggesting that physical violence against client's wife would have been appropriate); In re Williams, 414 N.W.2d 394 (Minn. 1987) (racial slur); Principe v. Assay Partners, 586 N.Y.S.2d 182 (Sup.Ct. 1992) ("Be quiet, little girl"); Florida Bar v. Adams, 641 So.2d 399 (Fla. 1999) (falsely accusing opposing counsel of coercion of witness). In fact, Mr. Spaeth could be subject to the same claimed violation for stating that "Mr. Garaas just hasn't read the rule." (DE 24 at 31) Rule 4.4 was not intended to apply to any situation where attorneys became uncivil or impolite to each other.

Whether an attorney or witness is telling the truth is always relevant in any hearing before the court. On November 7, 2000, it was particularly relevant and important because Mr. Spaeth had just told the court that Garaas had conceded the entire case. The entire basis for TAG's defense after the Supreme Court determined that the 1996 Option was still in effect after June 1, 1999, is that although the 1996 Option was still in effect, and TAG always agreed to follow the terms of the Option, Matrix had not performed its obligations under the Option, most importantly tendering the proper purchase price, and thus, TAG was not obligated to proceed to closing. By representing to the court on November 7, 2000 that Garaas was ready to close, Spaeth was essentially saying that Garaas had conceded his client's entire position and the case was over. As Garaas testified, if

he had actually said what Spaeth represented, he would have had to "open my pocketbook" to pay a large malpractice claim. (Tr. at 295) While Mr. Spaeth and his client obviously wanted Garaas to "give up" and proceed to closing, he did not accurately represent Garaas' previous statements regarding TAG's willingness to abide by the terms of the option. Garaas had to immediately respond to protect his credibility and his client's case.

Rule 4.4 prohibits an attorney from raising completely irrelevant issues that serve only to embarrass or degrade another attorney or other third-party. Clearly, Mr. Spaeth's statement was relevant, and in fact, went to the heart of TAG's defense. Furthermore, Garaas' statement regarding Mr. Spaeth was not done to embarrass or degrade him, but rather to forcefully tell the court that what Mr. Spaeth had just stated was absolutely false. It is not uncommon for an attorney to point out that a statement by an opposing attorney or witness is a "misrepresentation." (Tr. at 273, 400) Calling Spaeth's statement a "lie" versus an "intentional misrepresentation" or an "absolute falsehood" is what Assistant States Attorney Mark Boening described as "circumlocution." (Tr. at 273) Spaeth's statement was incorrect and Garaas immediately and zealously pointed that out to protect himself and his client.

Garaas did not intend to embarrass Mr. Spaeth, and more importantly, Mr. Spaeth testified that he did not feel embarrassed or degraded by Garaas' statement. (Tr. at 148) Notably, there was no reaction or warning from Judge Racek after Garaas made the

statement. (DE 24, page 32) As Judge Tom Davies testified, attorneys sometimes get uncivil towards each other "in the heat of the battle" and must be warned or chastised. (Tr. at 225-26) Neither Mr. Spaeth nor Judge Racek reacted to Garaas' statement. In fact, Mr. Spaeth apologized for misquoting Garaas. (Tr. at 115) Furthermore, in response to Mr. Fisher's question that "if you had heard those words . . . your blood might have boiled," Judge Racek responded "probably." (Tr. at 59) Although some may say Garaas' r esponse that "Mr . Spaeth just lied" was overzealous and impolite, it does not constitute a violation of Rule 4.4.

Moreover, finding that Garaas' statement violates Rule 4.4 would in turn violate Garaas' First Amendment rights. As set forth above, attorneys retain their right to free speech provided that speech does not cross the line and become disruptive conduct. Garaas' statement was true and did not disrupt the hearing in any way. As previously stated, neither Mr. Spaeth nor the court reacted at all to Garaas' statement. In sum, Garaas' statement does not warrant a sanction under the plain language of Rule 4.4, nor can a sanction be imposed for such a statement under the First Amendment.

5. January 2, 2001 - Garaas did not seek to influence Judge Racek by unlawful means.

Without requiring Disciplinary Counsel to plead and then prove that Garaas sought "to influence a judge by means prohibited by law," the Hearing Panel

determined that Garaas violated Rule 3.5(a), N.D.R.Prof.Cond. The claimed violation stems from Garaas' statement to the court at the January 2, 2001 status conference:

> There [are] a lot of things that are going to have to be resolved, and I guess frankly I have a question in my mind as to whether or not the Court wants to enter into a course of action that places the trial court judge and the State of North Dakota at risk..

(DE 25, page 7) The "risk" Garaas was referring to was the possibility of Judge Racek, in his official capacity, and the State being civilly liable for acting without jurisdiction. It is well established that a judge loses his/her judicial immunity and can be subject to liability if he/she acts in complete absence of all jurisdiction. Mireles v. Waco, 502 U.S. 9 (1991). That is the risk Garaas was trying to get the court to recognize.

Obviously, any conduct that constitutes a crime, such as threats of physical harm or bribery, would violate Rule 3.5(a). However, no such conduct has been alleged in this matter. Further, Disciplinary Counsel has not alleged that Garaas contributed to any violation of the Rules of Judicial Conduct.

There is nothing improper or illegal about a lawyer asserting an argument or opinion that has a valid basis in law. Threatening a public official with

a lawsuit is not unlawful, as determined by this Court in State v. Haugen, 392 N.W.2d 799, 805-06 (N.D. 1986). In Haugen, this Court noted that "[c]ourts must be careful to distinguish what is a threat from what is constitutionally protected speech when the alleged "threat" is made in the midst of what may be other protected political expression." Id. at 803. With that background, the Court held that the defendants' "threat" of a lawsuit was protected speech and reversed their conviction. Id. at 804-05.

> The Nebraska Supreme Court has reached the same conclusion, finding:
>
> > If one "threatens" to sue in order to enforce one's lawful or presumed lawful rights, nothing illegal is done; however, a mere expression of an intention to enforce one's legal rights in a peaceable and lawful manner is not the type of threat which the statute was enacted to restrict.

State v. Maez, 281 N.W.2d 531, 533 (Neb. 1979).

At the time of the January 2, 2001 hearing, there were two appeals pending with this Court. TAG had appealed Judge Racek's November 8, 2000 order on December 15, 2000. Additionally, TAG had filed a Petition for Rehearing of the Supreme Court's December 15, 2000 decision. (Tr. at 334) Clearly, Garaas had a valid basis to argue that the district

court had no jurisdiction on January 2, 2001 in light of these appeals. Garaas' argument may have been inartfully stated and ineffec tive, but it cannot be considered a "means prohibited by law." Even Judge Tom Davies testified that he has been accused on exceeding his jurisdiction and could be subject to civil liability. Judge Davies does not take this argument as a threat or improper. Rather, he "sweat[s] a little bit inside and say[s] 'I hope I'm not exceeding my jurisdiction' and get on with it." (Tr. at 227-28) Even Mr. Spaeth agreed that it was not "illegal means" as he agreed with the Panel's question that the argument could be made in "the proper context." (Tr. at 138) Obviously, Rule 3.5(a) is not intended to apply to this situation.

Furthermore, Rule 3.5(a) must be applied in light of Garaas' right to free speech. Garaas' statement was his opinion of the law and what could happen if the court proceeded without jurisdiction. A statement of opinion is always protected by the First Amendment, unless the opinion implies a false statement of fact. In re Green, 11 P.3d at 1084. "Thus, for example, if an attorney criticizes a judge's ruling by saying it was 'incoherent,' he may not be sanctioned." Id. Garaas voiced his opinion that the court could be liable for acting without jurisdiction, which is protected under the First Amendment. Thus, he cannot be disciplined under Rule 3.5(a) based upon the statement alleged by Disciplinary Counsel.

6. January 2 & 5, 2001 – Garaas did not engage in any conduct that disrupted the hearing.

The Hearing Panel found that Garaas violated Rule 3.5(b), which provides that a lawyer shall not "engage in conduct intended to disrupt a tribunal." This claimed violation is based on the January 2 "at risk" statement and Garaas' requests at the January 5, 2001, hearing for the trial court to explain its basis for ordering the transfer of the subject property and its basis for exercising its jurisdiction. The previous discussion in this Brief concerning the "at risk" statements is incorporated by reference in that discussion is equally pertinent herein. On January 5, 2001, although Garaas was persistent in his questioning to the court, there is no evidence, nor finding, that his intent was to disrupt the proceeding. To the contrary, Garaas' only intent was to make a clear record of the basis for the court's action in order to protect his client's interests.

The Comment to Rule 3.5 states that "[r]efraining from abusive or obstreperous conduct is a corollary of the lawyer's right to speak on behalf of litigants. . . . A lawyer can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics." The rule clearly intends to prohibit extreme and outrageous conduct by attorneys. Although Garaas was persistent and vigor ous in his questioning of the court's rationale, he was not abusive towards Judge Racek and did not engage in any outrageous behavior.

No lawyer is comfortable asking a judge questions, as it my be interpreted as disrespectful. However, as Mark Boening stated:

> I think that's part of an advocate's job. It's always uncomfortable because in my experience the judges take offense to that. The common reaction is, 'Well, I'm not here to teach you, Mr. Boeing, on how to practice law.' But the fact of the matter is when you're appearing as a zealous advocate, whether on behalf of a defendant or the State, part of what you're doing is making a record, and this may well be a matter that goes up on appeal. And if you've got some question with regard to an issue that's not clear from the record, you do your client a disservice not to ask the question. You're attempting to clarify the record. (Tr. at 274)

David DeMars, who was a neutral third-party at that hearing, described Garaas' questioning as: "I guess the best characterization I could give it was persistent, as I think the colloquy indicates." DeMars further stated that every lawyer "pushes harder or less harder [sic] differently." (Tr. at 151-52) Overly persistent questioning of the court does not rise to the level of a ethical violation. Garaas did not threaten physical violence. See Johnson, 544 N.W.2d at 522. Garaas did not mock Judge Racek's statements or rulings. See In re Daniels, 570 A.2d 416 (N.J. 1990). He did not use any profanity or derogatory terms

towards Judge Racek. See Moffatt v. Buano, 569 A.2d 968 (Pa. 1990) (calling judge "asshole"); Prucker v. Statewide Grievance Comm., 1995 WL 356758 (Conn.Super.Ct.) ("this is bullshit"). Garaas' colloquy with Judge Racek simply did not rise to the level necessary to constitute a violation of Rule 3.5(b).

Further, it is important to note what the colloquy in the transcript does not show. As David Garaas testified, there were pauses after several of Garaas' questions to the court, which led Garaas to believe Judge Racek was reluctant to answer Garaas' question. (Tr. at 452-55) Because of this, Garaas rephrased the question to attempt to get a response from the court so that Garaas had a clear understanding of the court's basis for acting, and to preserve the record for his client. Judge Racek did state that he was acting pursuant to the Supreme Court's decision of December 12, 2000. (DC-3 at 22) However, that decision was subject to a Petition for Rehearing. Garaas had a legitimate basis to question the court's rationale for proceeding when the decision upon which the district court was relying on was not a final decision. Garaas also needed to establish whether Judge Racek had received notice that the Petition for Rehearing had been denied or a new order issued prior to the attorneys knowing of it. As this Court is aware, it is not uncommon for Court to notify the trial judge and/or the attorneys of a decision prior to it being published. If the Petition had been denied, then Judge Racek could have validly relied on the December 12, 2000 decision, as it would be final. Garaas' only goal in his persistent questioning was to

clearly understand what order was the basis for the court's action.

Judge Racek did not find Garaas in contempt on January 2, 2001 or January 5, 2001. The ABA, in its Annotated Model Rules of Professional Conduct, indicates that a violation of Rule 3.5(b) is very often equated with criminal contempt. Id. at 343-44 (3rd ed. 1996). When Judge Racek told Garaas to sit down or be removed, Garaas did sit down. In fact, when Garaas realized that Judge Racek became offended by his questioning, Garaas' tone became "apologetic." (Tr. at 443)

In sum, there was no conduct that was intended to disrupt the tribunal or that actually did disrupt the hearing. Judge Racek admits the court's business was accomplished and an order was entered. (Tr. at 56) When told by Judge Racek to sit down, Garaas did sit down. (Id.) The Hearing Panel's questioning of Judge Racek succinctly describes the situation:

> Q. Right, right. Okay. Why didn't you sanction Mr. Garaas for contempt?
> A. In what instance?
> Q. In any of the instances that are subject to the petition for discipline.
> A. The Court was attempting to resolve the matter the best it could, and on January 2 the Court was still hopeful that the

> parties could resolve the matter. On January 5 when it became apparent that the Court was going to have to resolve the matter Mr. Garaas did comply with the directive of the Court in the transcript to continue no further in the argument he was making and the Court was able to complete its business.

(Tr. at 63. (emphasis added.)) Based on Judge Racek's testimony, there was no violation of Rule 3.5(b).

7. Garaas did not bring reproach upon the legal profession.

The Hearing Panel concluded Garaas violated Rule 8.4(e), which states that it is professional misconduct to "[e]ngage in other conduct that is enumerated in the North Dakota Century Code as a basis for revocation or suspension of a lawyer's certificate of admission." Disciplinary Counsel claims that Garaas violated N.D.C.C. §§ 27-13-01(1) and 27-14-02(7), and thus is subject to discipline under Rule 8.4(e).

Neither of these statutes are applicable to Garaas. First, Rule 8.4(e) specifically requires that to be applicable for disciplinary grounds, the underlying statute must provide "a basis for revocation or suspension of a lawyer's certificate of admission." Section 27-13-01 does not provide grounds for

revocation or suspension of a lawyer's license. Section 27-13-01 sets forth the "Duties of Attorneys," it does not set forth the grounds for disbarment. The grounds for disbarment are specifically set forth in § 27-14-02. Thus, § 27-13-01 is inapplicable for disciplinary purposes.

More importantly, using § 27-13-01(1) as a basis for discipline would violate a lawyer's First Amendment rights. Section 27-13-01(1) states that attorneys shall "[m]aintain respect for courts of justice and judicial officers." As set forth above, the First Amendment protects a lawyer's right to criticize a judge or the court as long as the statements are not made with actual malice or are disruptive. As stated by Professor Freedman, "lawyers' criticism of judges is desirable and constitutionally protected." Freedman, *The Threat to Judicial Independence by Criticism of Judges – A Proposed Solution to the Real Problem*, 25 Hofstra Law Review, at 729. Thus, using § 27-13-01(1) as a basis for discipline in situations where the alleged violation consists of only of critical statements made by an attorney would clearly violate the First Amendment. Such is the case in the instant matter.

The apparent basis for the alleged violation of § 27-13-01(1) are Garaas' statements to Judge Racek. There is no evidence that these statements were made with actual malice or disrupted any proceeding. Garaas' statements are protected by the First Amendment and cannot be the basis for discipline.

While § 27-14-02 does state grounds for revocation or suspension of an attorney, and thus is applicable under Rule 8.4(e), Garaas did not violate that statute. Disciplinary Counsel claims a violation of only subsection (7) of § 27-14-02, which states that an attorney may be suspended or disbarred if he/she "[c]ommitted any other act which tends to bring reproach upon the legal profession." Although Garaas' statements and argument in the relevant hearings may be described as vigorous and persistent, his statements did not result in any damage to the legal profession.

Section 27-14-02(7) is intended to cover serious misconduct that results in the general public having less trust and respect for attorneys and the courts. See Disciplinary Bd. v. Schubert-Madsen, 533 N.W.2d 145 (N.D. 1995) (finding attorney violated § 27-14-02(7) based on attorney's failure to diligently and competently represent client, for stealing from firm trust account, and for lying to client). When an attorney steals from a client or is convicted of a dealing drugs, that brings reproach upon the legal profession. Garaas' statements did not involve any dishonest or criminal act. The only thing Garaas could be accused of is being overzealous and impolite. Garaas did not "bring reproach upon the legal profession," and therefore, did not violate § 27-14-02(7) or Rule 8.4(e).

In an analogous case arising out of the U.S. District Court in Bismarck, the U.S. Supreme Court held that an attorney's harsh criticism of the court's administration of the federal Criminal Justice Act with

respect to appointed defense attorneys did not constitute "conduct unbecoming a member of the bar," under Rule 46, F.R.App.Pro. In re Snyder, 472 U.S. 634,646-47 (1985). Likewise, while Garaas' statements may be considered impolite and too aggressive, they do not rise to the level of "bringing reproach upon the legal profession," therefore should not be the basis for discipline under § 27-14-02(7) or Rule 8.4(e).

8. Rule 1.2(a)(8) of the Rules for Lawyer Discipline is duplicative.

The Hearing Panel found a violation of Rule 1.2(A)(8), N.D.R.Lawyer.Discipl.

There is no evidence that Garaas willfully violated any order of the court, nor was it even alleged. Judge Racek agreed that when Garaas was ordered to sit, he did so and was silent. (Tr. at 63) Further, Garaas did not prevent the administration of justice, as the court hearings were all completed and Matrix was awarded everything it sought. To the extent that Disciplinary Counsel is claiming that Garaas' statements to opposing counsel and Judge Racek were somehow "prejudicial to the administration of justice," this alleged violation is duplicative and subsumed by the more specific provisions of Rule of Professional Conduct 3.5, as argued above.

* * *

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

IN THE MATTER OF THE APPLICATION FOR DISCIPLINARY ACTION AGAINST JONATHAN T. GARAAS, A MEMBER OF THE BAR OF THE STATE OF NORTH DAKOTA	Supreme Court Nos. 20020103 20020113

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STATEMENT OF FACTS

Disciplinary Counsel correctly states that the statements made by Jonathan T. Garaas at the various hearings at issue in this matter are not in dispute. Disciplinary Counsel accurately quotes the relevant transcript pages from these hearings and limits his view of relevant facts to the actual statements made by Garaas. Disciplinary Counsel is correct that the time and manner, or conduct of

Garaas when speaking, was not placed in issue by him in this proceeding but rather **only** the content of the speech. Disciplinary Counsel's view is faulty, however. For First Amendment analysis, the particular excerpts from these transcripts cannot be viewed in isolation. As was set forth in Garaas' initial Brief to this Court, Garaas' statements and arguments must be considered in their proper context. When Garaas' statements are viewed in their proper context, it is clear that Garaas did not seek to influence Judge Racek by means prohibited by law, did not disrupt the proceedings nor destroy the decorum of the court, and did not intend to harass or embarrass any third party.

Disciplinary Counsel argues, in his Brief, that Garaas, in the various hearings, was insolent, confrontational, hostile, belligerent or threatening. See Disciplinary Counsel's Brief, pages 27-29. This is merely argument of Disciplinary Counsel for there is no pleading nor proof, by clear and convincing evidence, of such conduct by Garaas in any of the post-judgment court proceedings. The facts established at the Disciplinary Panel's hearing do not support Disciplinary Counsel's arguments, and the Disciplinary Hearing Panel did not find such conduct existed.

At worst, Garaas' statements and questioning were described as overly persistent and more zealous than some attorneys may have done. Garaas did not engage in any name calling or profanity. He never interrupted anyone. He waited his turn to speak. He almost always referred to the court as "Your Honor." He did not engage in any theatrics or other physically

disruptive behavior. The Court was always able to complete its business, and Garaas was never found in contempt for disruptive behavior or for willfully disobeying a court order. For each of the four statements made by Garaas, in post-judgment proceedings, Garaas had a reasonable basis for his opinion, statement or question. There exists no proof that any statement made by Garaas was not true (or not believed to be true by Garaas).

LAW AND ARGUMENT

1. Case law cited by Disciplinary Counsel does not support a violation, nor suspension, nor public reprimand

The cases relied upon by Disciplinary Counsel do not support a finding of a disciplinary violation by Jonathan T. Garaas, and do not support a suspension or public reprimand of Garaas.

The cases cited by Disciplinary Counsel supporting suspension involve physical violence, violation of court orders, bad conduct with no legitimate purpose other than to shut down the legal process, and dishonest and fraudulent acts. It is not the intention of Respondent to address all of the cases cited by Disciplinary Counsel but address some cases to show the required pattern of conduct that leads to an ethical violation and sanction is not comparable to the facts of this case which is based upon speech alone.

In the case of Attorney Grievance Commission v. Alison, 565 A.2d 660 (Md. 1989), a 90-day suspension was imposed upon an attorney who for two years had "engaged in a course of professional and private conduct that was inappropriate, rude, vulgar, insulting, occasionally dangerous, and sometimes criminal." The attorney in this matter had assaulted and harassed his ex-wife, resisted arrest, and on several occasions used profanities in addressing opposing counsel and clerks of court. Id. at 661-65. In In re Belue, 766 P.2d 206 (Mont. 1988), an attorney was given a 3-month suspension for numerous acts that included filing a frivolous disciplinary complaint against opposing counsel alleging bribery of the judge, intentionally disregarding a court order, obstructing the deposition of a witness by making baseless objections and advising the witness not to testify, physically assaulting opposing counsel, "intimidating, threatening, arguing and quarreling with various individuals, publicly and privately, in eight separate incidents involving seven different individuals extending over a period from 1981-1985," and harassing and intimidating a deputy sheriff, among other violations. Id. at 208-11. A 90 day suspension was imposed in Florida Bar v. Adams, 641 So.2d 399 (Fla. 1994) for an attorney who falsely accused opposing counsel of suborning perjury with the court also noting that he changed his name three times during the disciplinary process. Clearly, Garaas' statements to the Court, at issue in this matter, do not even approach the wrongdoing of the above cases.

A review of In re Williams, 414 N.W.2d 394 (Minn. 1987) discloses that the attorney violated

warnings and admonitions of the court regarding his violation of the rules of court and trial procedures on a daily basis throughout a six-week trial. Such acts were found to be "calculated trial tactics to provoke and bait opposing counsel, intimidate and demean witnesses and obfuscate the record." Id. at 7. This does not compare to Garaas' isolated incidents at the relevant hearings, where Garaas addressed the court as "Your Honor," did not interrupt, and the business of the court was always accomplished. This matter is clearly distinguishable from that in Williams, where the arguments of counsel were disruptive and calculated to have that effect.

Furthermore, even the cases relied upon by Disciplinary Counsel that imposed a reprimand involved actions more egregious than the statements made by Garaas. In In Re Stanley, 507 A.2d 1168, 1168-70 (N.J. 1986), the attorney was admonished by the court for interrupting on numerous occasions, shouted and pointed his finger at the court, refused to follow the court's directive regarding interrogation of a witness, laughed out loud at the court's rulings, and threw a pencil. Most importantly, the attorney was so disruptive that the court terminated one of the hearings. The attorney was ultimately found to be in contempt. Id. at 1171. For being found in contempt and engaging in these improper "theatrics," the attorney received a reprimand. In the case of In re Turner, 631 N.E.2d 918 (Ind. 1994), an attorney stipulated to public reprimand for calling the court a "mickey mouse court" and its rulings "ridiculous."

In Oklahoma Bar v. Whiteley, 792 P.2d 74 (Ok. 1990), the attorney received a reprimand for failing to appear at a hearing, was the subject of an arrest warrant, lied about having knowledge of the warrant, and became combative and disruptive when questioned about the warrant at another hearing. The attorney stipulated to an ethical violation for knowingly intending to disrupt the tribunal. Additionally, the attorney was found to have violated additional rules of ethics by failing to keep his clients informed, lack of diligence, and charging an unreasonable fee. For all of these violations, he received a public reprimand.

Disciplinary Counsel relies on In re DeMarco, 539 A.2d 1230 (N.J. 1988), a contempt case, to support his argument that Garaas' statements violated Rule 3.5(b) by destroying the decorum of the court. Attorney DeMarco, among other things, baited the court on numerous occasions to find him in contempt, repeatedly attacked the objectivity and integrity of the judge, and when ordered to be quiet, disrupted the trial by declaring that "There's not a judge or man who would quiet me in a courtroom when I'm defending a client." Id. at 1235. Disciplinary Counsel also relies on U.S. v. Engstrom, 16 F.3d 1006 (9th Cir. 1994). In that case the attorney "displayed flagrant defiance" of the court's orders and made the following statements: "I hear you, but I can't believe it," "You are making a mockery of the judicial process," and "This is a kangaroo court." Id. at 1012. The attorney also stated that the judge was "having delusions" and made other personally insulting remarks about the judge. Id.

In the case of In Re. Coe, 903 S.W. 2d 916 (Mo. 1995), the attorney received a public reprimand for engaging in conduct intending to disrupt a tribunal. During a 39 day, four defendant criminal conspiracy trial in federal court, Coe had been found in contempt four times for her conduct. Her conduct included repetitiously asking questions over sustained objections, bodily gesturing to the jury to show displeasure with the court's ruling after being ordered not to speak after the court made its rule, and unfounded accusations concerning the court's conduct.

Garaas' speech cannot be equated to any of the conduct described above. The cases cited by Disciplinary Counsel primarily regard "conduct" involving willful violation of court orders and behavior that was intended to, and did, result in the disruption of the legal process. Garaas did none of this. Garaas' arguments were not intended to disrupt any proceeding, but rather were only intended to make a complete record to protect his client's interests. Garaas should not be equated with the attorneys disciplined in the above cases and should not be subject to any discipline in this matter.

2. Garaas' statements are protected under the First Amendment

After the parties submitted briefs to this Court on June 21, 2002, the Supreme Court of the United States issued two opinions that bolster Garaas' argument that this disciplinary proceedings solely involves constitutionally protected speech.

One of the two cases is Republican Party of Minn. v. White, 536 U.S. ___ (2002). This case reaffirms the legal principle that to prohibit speech on the basis of content in political speech – speech at the core of the First Amendment – the restriction must be narrowly tailored to serve a compelling state interest. To show the restriction on speech is narrowly tailored, the proponent of the restriction must establish the restriction does not "unnecessarily circumscrib[e] protected expression." Id., Slip Opinion at page 8. This was not done, nor even attempted, by Disciplinary Counsel.

Garaas' position on his free speech rights is also bolstered by the case of BE & K Constr. Co. V. NLRB, 536 U.S. ___ (2002) which case, on Slip Opinion pages 13-15, states:

> It is at least consistent with these "breathing space" principles that we have never held that the entire class of objectively baseless litigation may be enjoined or declared unlawful even though such suits may advance no First Amendment interests of their own. Instead, in cases like *Bill Johnson's* and *Professional Real Estate Investors,* our holdings limited regulation to suits that were both objectively baseless *and* subjectively motivated by an unlawful purpose. But we need not resolve whether objectively baseless litigation requires any "breathing room"

protection, for what is at issue here are suits that are not baseless in the first place. Instead, as an initial matter, we are dealing with the class of reasonably based but unsuccessful lawsuits. But whether this class of suits falls outside the scope of the First Amendment's Petition Clause at the least presents a difficult constitutional question, given the following considerations.

First, even though all the lawsuits in this class are unsuccessful, the class nevertheless includes a substantial proportion of all suits involving genuine grievances because the genuineness of a grievance does not turn on whether it succeeds. Indeed, this is reflected by our prior cases which have protected petitioning whenever it is genuine, not simply when it triumphs. See, *e.g.*, *Professional Real Estate Investors,* 508 U.S., at 58-61 (protecting suits from antitrust liability whenever they are objectively or subjectively genuine); *Pennington,* 381 U.S., at 670 (shielding from antitrust immunity any "concerted effort to influence public officials"). Nor does the text of the First Amendment speak in terms of successful petitioning – it speaks simply of "the right of the people ... to petition the Government for a redress of grievances."

Second, even unsuccessful but reasonably based suits advance some First Amendment interests. Like successful suits, unsuccessful suits allow the "'public airing of disputed facts,'" *Bill Johnson's, supra,* at 743 (quoting Balmer, Sham Litigation and the Antitrust Law, 29 Buffalo L. Rev. 39, 60 (1980)), and raise matters of public concern. They also promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around. Moreover, the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force. See Andrews, A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right, 60 Ohio St.L.J. 557, 656 (1999) (noting the potential for avoiding violence by the filing of unsuccessful claims).

Finally, while baseless suits can be seen as analogous to false statements, that analogy does not directly extend to suits that are unsuccessful but reasonably based. For even if a suit could be seen as a kind of provable statement, the fact that it loses does not mean it is false. At most it means the plaintiff did not meet its burden of proving its truth. That does

not mean the defendant has proved–or could prove–the contrary.

In each of the four instances of speech in issue in this case, Garaas was addressing the Court to assert his client's position. The speech of January 2 and 5, 2001, found sanctionable by the Hearing Panel, related to Garaas' opinion of the Court's jurisdiction.

This sanctioned speech, as well as all other statements made by Garaas in issue, are clearly First Amendment activity. On behalf of his client, Garaas was petitioning a branch of government - the judiciary - from acting in a manner that might place the Court at risk of acting without jurisdiction. There was a reasonable basis to the opinion held by Garaas in that this Supreme Court, on all occasions of speech in issue, retained jurisdiction because of a pending appeal. Telling the judicial branch that it is at risk of acting without jurisdiction, or informing a Court that it lacks jurisdiction, is speech that lies at the core of the First Amendment. As to January 5, 2001, Disciplinary Counsel is playing word games in reference to Garaas' paraphrase of his Petition for Rehearing. "False" implies inaccuracy. The word, "wrongful" implies injury. The opinion of Garaas expressed in petitioning a branch of government, expressly authorized by the First Amendment as core protected speech, is clearly First Amendment activity and not sanctionable. Every statement at issue is also protected speech.

In a nutshell, Disciplinary Counsel failed to plead, and then prove by clear and convincing

evidence, that Garaas' speech presented a clear and present danger to disrupting a tribunal or the respect due a court and the legal profession. In a nutshell, Garaas did not violate any statute or rule of disciplinary procedure, nor was there any evidence presented to the contrary.

CONCLUSION

This Court should determine that Garaas' speech is constitutionally protected, and not sanctionable.

Respectfully submitted this 3rd day of July, 2002.

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BEFORE THE DISCIPLINARY BOARD OF THE

SUPREME COURT OF THE STATE OF NORTH DAKOTA

IN THE MATTER OF THE APPLICATION FOR DISCIPLINARY ACTION AGAINST JONATHAN T. GARAAS, A MEMBER OF THE BAR OF THE STATE OF NORTH DAKOTA	))))))	PETITION FOR DISCIPLINE File No. 3479-SE-0101

It is alleged as follows:

I.

Jonathan T. Garaas was admitted to practice as an attorney and counselor at law in the court of North Dakota on July 27, 1973, and his name has appeared since that date on the roll of attorneys admitted to the Bar of North Dakota as maintained by the Supreme Court of North Dakota.

II.

Garaas represented defendants in a case entitled Matrix Properties Corp., et al. v. TAG Investments, et al., venued in the District Court of Cass County, East Central Judicial District. A Motion to Compel Transfer of Deeds/Property in the matter was held on November 7, 2000, presided over by District Judge Frank L. Racek. The plaintiff was represented at the hearing by attorney Sidney J.

Spaeth. During the hearing Garaas said "Your honor, I cannot let it go by one more time because Mr. Spaeth just lied to you one more time. I have never said I was willing to close. That representation is an absolute falsehood and he can't get away with it anymore. We are willing to honor the Option to Purchase dated October 14, 1996. We will never accept any deviation from its terms. And we will never accept Mr. Spaeth's false representation in violation of the Canons and in violation of every concept of due process that I know." Garaas also made several other accusations of intentional misrepresentation by Spaeth at the hearing.

III.

A status conference in the matter was held on January 2, 2001, presided over by District Judge Frank L. Racek. During the hearing Garaas was asked whether his client was going to sign a warranty deed when he was ordered to do so on the following Friday. Part of Garaas' response was "There are a lot of things that are going to have to be resolved, and I guess frankly I have a question in my mind as to whether or not the Court wants to enter into a course of action that places the trial court judge and the State of North Dakota at risk." Another part of Garaas' response was "So when you ask me a question as to whether or not we are going to sign a deed, there are so many things that still have yet to be resolved that why would the Court want to put this Court and the State of North Dakota at risk...."

IV.

A "Court Overseen Closing" in the matter was held on January 5, 2001, presided over by District Judge Frank L. Racek. During the hearing, the following colloquy occurred between Garaas and Judge Racek:

THE COURT:	The Defendant – the Defendant's counsel in the presence of the Court has informed the Court that they'll not comply with the Court's order. Proceed.
MR. GARAAS:	Which Court order are talking about, Your Honor?
THE COURT:	The order to convey it's property.
MR. GARAAS:	Which one was that, Your Honor?
THE COURT:	The one they just made.
MR. GARAAS:	At this point in time?
THE COURT:	Yes.
MR. GARAAS:	On what legal basis, Your Honor?

THE COURT: Enough. Sit. Enough.

MR. GARAAS: On what legal basis? I only ask that this Court identify on what legal basis it acts, because my client has a right to know. My client has a right to due process of law, Your Honor.

THE COURT: Proceed.

MR. GARAAS: You will not answer my question, Your Honor?

THE COURT: Mr. Garaas, I've already put on the record that we're proceeding pursuant to the Supreme Court's directive of December 12th.

MR. GARAAS: And how does the Court get around the fact that it isn't a final Supreme Court order and the mandate has not been returned to you and jurisdiction still is at the Supreme Court, Your Honor? How can this Court act in derogation on it's duties to honor the fact that jurisdiction is now at the Supreme Court level

not back here. This Court can't act, Your Honor, on the basis of the December 12, 19– of the year 2000 decision of the Supreme Court. How can the Court act when it doesn't have jurisdiction based upon that order, Your Honor? My client would like to know.

THE COURT: The Court's been directed by the Supreme Court to proceed. The Supreme Court directs the District Court what to do. I am proceeding under that directive.

MR. GARAAS: Is there a directive that's different than the December 12, 2000, order, Your Honor ? Has there been direct communication between the Supreme Court and this Court that is not of record and not reported on December 12th. Because there is no such directive other than the December 12th and that's not a final order. Is there a directive from the

Supreme Court to this Court to proceed today that is not placed of record, Your Honor? Have you had telephone conversations with any member of the Supreme Court?

THE COURT: Mr. Garaas, of course not. But this now is getting to be ridiculous. You've tried these arguments now in front of eight different judges, five in the Supreme Court, Judge Erickson, this Court, Judge Webb. It's over now so we're gonna proceed. Go ahead.

MR. GARAAS: Has there been communications with any representative of the Supreme Court of North Dakota?

THE COURT: Sit down now, Mr. Garaas. Proceed.

MR. GARAAS: May I – my client and I would like to know, Your Honor.

THE COURT: Mr. Garaas, this is the last time now before I ask you to be removed from the Court. We're gonna proceed with the hearing. Your partner will have to sit in your place. But this is beyond any appropriate measure of conduct for an attorney.

THE COURT: Proceed.

V.

Also at the "Court Overseen Closing" in the matter held on January 5, 2001, Garaas told Judge Racek "On December 21, 2000, we prepared a petition for rehearing from that appeal. The first issue was that the North Dakota Supreme Court has wrongfully identified the issue on appeal. Actually they made a false representation of what the issue was being appealed."

VI.

The conduct of Jonathan T. Garaas violates the following Rule of Professional conduct:

1. Rule 3.5(a), IMPARTIALITY AND DECORUM OF THE TRIBUNAL, RPC, which provides that a lawyer shall not seek to influence a judge by means prohibited by law by threatening judge Racek with some personal consequence to

himself, as set out in paragraph III of the Petition.

2. Rule 3.5(b), IMPARTIALITY AND DECORUM OF THE TRIBUNAL, RPC, which provides that a lawyer shall not engage in conduct intended to disrupt a tribunal, through his conduct as set out above in the Petition.

3. Rule 4.4, RESPECT FOR RIGHTS OF THIRD PERSONS, RPC, which provides that a lawyer shall not use means that have no substantial purpose other than to embarrass or burden a third person, through the remarks made against his opposing counsel as set out in the Petition.

4. Rule 8.4(e), MISCONDUCT, RPC, which provides it is professional misconduct to engage in conduct enumerated in the North Dakota Century Code as a basis for revocation or suspension of a lawyer's certificate of admission, through violation of § 27-13-01(1), NDCC, maintaining respect for the Court, and § 27-14-02(7), NDCC, committed any other act that brings reproach upon the legal profession.

5. Rule 1.2A(8), NDRLD, engage in conduct prejudicial to the administration of justice.

WHEREFORE, it is the request that Jonathan T. Garaas be disciplined.

Dated this 4th day of May, 2001.

BY: /s/ Paul W. Jacobson
Paul W. Jacobson (ID 03631)
Disciplinary Counsel
Disciplinary Board of the
Supreme Court
P.O. Box 2297
Bismarck, ND 58502
(701)328-3925

IN DISTRICT COURT, COUNTY CASS,
STATE OF NORTH DAKOTA.

Matrix Properties Corp,
f/k/a E. W. Wylie Corporation,
a MN corp.,

File No.
CV-99-02045

Plaintiff,

vs.

STATUS CONFERENCE

TAG Investments, a ND
partnership, and James A.
Grettum, and (sic) individual,

Defendants.

TRANSCRIPT

OF

PROCEEDING

Taken at
Cass County Courthouse
Fargo, North Dakota
January 2, 2001
BEFORE THE HONORABLE FRANK L. RACEK
- - - DISTRICT JUDGE - - -

* * *

[23] THE COURT: Ok. Is your client going to sign these deeds if the Court orders them to on Friday, Mr. Garaas?

MR. GARAAS: Your Honor, I really don't know why I am here. I don't know of any written request for a status conference, pretrial conference.

THE COURT: No. It was at the direction of the Court because I want to make sure on Friday we've got - - We've had hearing after hearing on this, and this is going to be the final hearing.

MR. GARAAS: When did that direction of the Court come because I didn't have any notice of that, and Rule 16(a) does provide me - -

THE COURT: Yeah. We've been through this before, but - -

MR. GARAAS: - - Your Honor, I have never seen any Order from this Court noticing this Status Conference or Pretrial Conference under Rule 16(a).

THE COURT: No. My concern is when we left last time, we weren't - - when I had thought about this afterwards we weren't clear about what we were going to do with these three pieces, and I wanted to make it absolutely concrete the plan we have for Friday so that the Court's time isn't wasted on Friday so that's why we are here.

MR. GARAAS: Well, Your Honor, when did the Court communicate with Matrix about that because I didn't have any - -

THE COURT: I told the Calendar Clerk to schedule it.

MR. GARAAS: And the Calendar Clerk contracted Matrix?

THE COURT: I have no idea.

MR. GARAAS: Because I didn't have any notice of it whatsoever. I got a notice from Mr. Spaeth that there was a Status Conference scheduled for this time without any communication whatsoever from the Court or from written request from Mr. Spaeth. The Rule provides for that, Your Honor.

THE COURT: Then somebody should apologize to you for not including you, but this was at the direction of Court, but the question is is your client going to sign a Warranty Deed when he is ordered to do so on Friday?

MR. GARAAS: It depends on what the Warranty Deeds says, Your Honor. There is a lot of things that are going to have to be resolved, and I guess frankly I have a question in my mind as to whether or not the Court wants to enter into a course of action that places the trial court judge and the State of North Dakota at risk. There is some issues of jurisdiction, the Court acting in excess of its jurisdiction, or acting without due process or law. We are talking the terms

of no evidence now or ever have been presented, no legal basis. None has ever been presented. We are altering the final judgment. We are altering a contract. There is a loss of jurisdiction due to a December 15th appeal. There is a loss of jurisdiction due to a July appeal that is still pending before the North Dakota Supreme Court. There is a violation of federally protected rights under 42 United States Code, 1981, 1982, 1983, 1985, 1986, and 1988.

We're essentially asking the Court to recognize that in fact if they are coming in and asking for a suit for specific performance and at the same time that they are asking for damages, there is an election of remedies issue that has to take place.

There is a question of whether or not they have the right to pursue anything at all because if there is a claim for damages that means that they are no longer pursuing their equitable remedy of specific performance which would in fact have been an alteration or a modification of what we thought was an otherwise valid and final judgment dated November 2, 1999, Your Honor.

We have a question as to a number of things which we have been denied the opportunity to have termination dates that are put in the contract enforced. We have been denied the opportunity for hearings on all of these things. So when you ask me a question as to whether or not we are going to sign a deed, there are so many things that still have yet to be resolved that why would the Court want to put this Court and the State of North Dakota at risk when we

are guaranteed to have another lawsuit, guaranteed to have another trial to determine whether or not there has been damages or a quiet title action and establish what the record is for this property.

* * *

STATE OF NORTH DAKOTA, COUNTY OF CASS
IN DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT

Matrix Properties Corporation, formerly known as, E.W. Wylie Corporation, a Minnesota corporation,

Plaintiff,

vs.

Civil No. 99-02045

Court Overseen Closing

TAG Investments, a North Dakota, partnership; and James A. Grettum, an individual resident of North Dakota,

Defendants.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE FRANK L. RACEK
- - - DISTRICT JUDGE - - -

Cass County Courthouse
Fargo, North Dakota 58103
January 5, 2001

* * *

[14] MR. GARAAS: Your Honor, might I be heard on that subject?

THE COURT: Briefly.

MR. GARAAS: Your Honor, I - - I believe that I have a copy of the North Dakota Rules of Court which include the North Dakota Rules of Appellate Procedure. Under Rule 35 of the North Dakota Rules of Appellate Procedure you don't have jurisdiction. If you are relying upon a December 12, 2000, order of the Supreme Court, you will also note that it was subject to a petition for rehearing.

You will also notice that if you look at the docket, there was in fact a timely petition for rehearing of that. It is still pending. The mandate does not get issued under the North Dakota Rules of Appellate Procedure until 21 days after the conjunction of a certified copy of the judgment of the Supreme Court and the opinion. The opinion is subject to petition for rehearing. As far as I know as of last night the Supreme Court has not yet acted on the petition for rehearing. And even if it did, it would not be issued until 7 days thereafter.

So this Court does not have jurisdiction if you are in fact relying upon the December 12 action of the Supreme Court of North Dakota because that is not a final decision. In fact, it's not even an accurate decision, an d we have set forth in a petition for rehearing a substantial number of issues that attack the actions of the Supreme Court because it in fact

has exceeded it's jurisdiction. The exceeding of it's jurisdiction consists of - - and I perhaps have that brief, Your Honor, and I'll just hit the high points.

On December 21, 2000, we prepared a petition for rehearing from that appeal. The first issue was that the North Dakota Supreme Court has wrongfully identified the issue on appeal. Actually they made a false representation of what the issue was being appealed. It was in fact an appeal from the June 26, 2000, order and they misrepresented what was being appealed from. We would have even been more vehement in our objection had the Court on June 26, 2000, said what the Supreme Court claimed that was done.

There had been no prior order of the Court that in fact directed a closing. Judge Erickson's language was quoted verbatim recognizing that as of December of 1999 all there had been was an exercise of an option and it was going to take further factual determinations as to determine what was going on and they had not taken place as of December of 1999. We pointed out that the Supreme Court has denied due process of law and equal protections of the law under point two.

And we cited some factual - - or some federal cases that specifically provide that the equal protection rights mean that the 42 United States Code, 1981, that my clients specifically have the same right in every state and territory to make and enforce contracts to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for

the security of persons and property. And in that federal statute it goes on to say that the term make and enforce contracts have special meanings which is, quote, includes the making, performance, modification and termination of contracts and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship. That we had a final judgment.

The federal law says that even the termination clause in the Option to Purchase - - and there were two that were significant. The February 28th Option to Purchase where they went into default for not having purchased, with a D at the end, or deeded, with an E-D at the end, and on a June 1, 2000, deadline for purchase of an additional 20 acres of land which had not been met in which they concededly had not been met had come and gone. And that the North Dakota Supreme Court had acted in excess of it's appellate jurisdiction. We set forth the three basic premises for their jurisdiction all of which are appellate in nature and they have no right to alter a final judgment which in fact what they would be doing by providing for any closing or directing to close.

We also pointed out that under the North Dakota statutes which also applies to the North Dakota Supreme Court that they're sworn to uphold that tender of payment as they are talking about is in fact one of the incidences of performance. And a suit for specific performance under the laws of the state of North Dakota by statute is not possible unless actual tender of performance and all of the incidences of payment have in fact taken place and it has never

taken place, Your Honor. They do not have the right to order a delivery of any deed at the Supreme Court level because that has appellate jurisdiction and that issue was never before them. And the North Dakota law puts the burden first upon them of full performance. Not tender of performance. Full performance. Fully performed before there can be any deed from our side.

So the North Dakota Supreme Court upon which you were relying has not finally acted, cannot finally acted and we presume that when they are acquainted with the federal law which also applies to them, including the constitution of the United States, that they will back off from an illegal, wrongful, and inappropriate determination that has significant factual and financial and legal implications to my clients which will not be tolerated.

So the Court's reliance upon the Supreme Court's decision is premature. There - - this Court doesn't have jurisdiction for all the reasons we advanced before. The November 8, 1990 - - excuse me, November 8, 2000, decision of this Court was in fact appealed. So you can't rely upon that because this Court instantaneously lost jurisdiction on that when that appeal took place on December 15th, the year 2000.

This Court does not have the right to act and you certainly don't have the right to rely upon a December 12, 2000, decision of the Supreme Court that isn't final and has not been sent back to you for action.

* * *

[15] MR. GARAAS: Your Honor, I speak for Mr. Grettum out of the last chance to comply with the Option to Purchases on June 1, 2000, the Option to Purchase had to have been brought out of default at that point in time. They never purchased the - - and that's an accomplished act, with a D at the end of purchase, by the definition of the North Dakota Supreme Court. They never purchased by that time. Even they concede that that transaction had to have been done by - - by July 7th. None of it has taken place. The Option to Purchase is over, Your Honor. There can be no act in furtherance of the Option to Purchase because they have lost all of their rights by nonperformance of their - - of their Option to Purchase obligations prior to the termination of the Option to Purchase. That's not just the ones that we've talked about before, but they have to first of all do an exercise that results in a closing within 45 days and there is no evidence whatsoever that they've ever tried to do that within any of the 45 day periods from the exercise, Your Honor. That would have been ended on August 15th - - August 16th if you want to go to the Monday of 1999. There's not one shred of evidence that they made any effort to do that and the burden had been upon them at that time to provide us with the title opinions within that time period so we could make a determination as to what we're going to do. But we were never given that opportunity, Your Honor. We were never faced with that prospect under the terms of the Option to Purchase dated October 14, 1996.

THE COURT: Go ahead.

MR. BUEIDE: Okay. So I guess we're back into the judicial transfer.

THE COURT: The Defendant - - the Defendant's counsel in the presence of the Court has informed the Court that they'll not comply with the Court's order. Proceed.

MR. GARAAS: Which Court order are you talking about, Your Honor?

THE COURT: The order to convey it's property.

MR. GARAAS: Which one was that, Your Honor?

THE COURT: The one they just made.

MR. GARAAS: At this point in time?

THE COURT: Yes.

MR. GARAAS: On what legal basis, Your Honor?

THE COURT: Enough. Sit. Enough.

MR. GARAAS: On what legal basis? I only ask that this Court identify on what legal basis it acts, because my client has a right to know. My client has a right to due process of law, Your Honor.

THE COURT: Proceed.

MR. GARAAS: You will not answer my question, Your Honor?

THE COURT: Mr. Garaas, I've already put on the record that we're proceeding pursuant to the Supreme Court's directive of December 12th.

MR. GARAAS: And how does the Court get around the fact that it isn't a final Supreme Court order and the mandate has not been returned to you and jurisdiction still is at the Supreme Court, Your Honor? How can this Court act in derogation of it's duties to honor the fact that jurisdiction is now at the Supreme Court level not back here. This Court can't act, Your Honor, on the basis of the December 12, 19- of the year 2000 decision of the Supreme Court. How can the Court act when it doesn't have jurisdiction based upon that order, Your Honor? My client would like to know.

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telephone conversations with any member of the Supreme Court?

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MR. GARAAS: I merely wanted to know what jurisdiction the Court was exercising, Your Honor.

* * *